Regionalism and the restructuring of the United Nations with specific reference to the African Union*

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Abstract

One of the most pressing current international issues is the restructuring of the United Nations (UN). Since its inception with an initial membership of fifty-one states, the UN has expanded dramatically and developed into a complex and fragmented global institution with a current membership of 193 states. The changing realities since 1945 have had a significant impact on the functioning and structure of the UN and reform of the international institution is therefore increasingly proposed and debated. One of these changing realities is the (renewed) process of regional integration in various parts of the world. The objectives and structures of the UN and regional organisations often display certain similarities and regional organisations often act within areas that were previously the monopoly of specifically the UN. This overlap in authority may create uncertainty as to the exact relationship between the UN and regional alignments. This article evaluates to what extent the African Union (AU) has progressed in its aim of continental regionalism and examines the impact that regionalism may have on the proposed restructuring of the UN. In view of the growing importance of regionalism it is suggested that serious consideration be given to eventually restructuring the UN as an international organisation consisting of 'sovereign' regional organisations. States invested with the basic aspects of sovereignty will then enjoy representation at the regional level, as it is at this level where their interests can best be served.

Introduction

One of the most pressing current international issues is the restructuring of the United Nations (UN). The UN was established in 1945 after World War II with the mandate to maintain peace and security by preventing war between countries, to foster economic and social development, to promote respect for human rights, and to provide a platform for international dialogue.[1] Since its inception with an initial membership of fifty-one states, the UN has expanded

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1 J Müller (ed) *Reforming the United Nations: the challenge of working together* (2010) 2.

dramatically and developed into a complex and fragmented global institution with a current membership of 193 states.[2] The changing international realities since 1945 have had a significant impact on the functioning and structure of the UN and reform of the international institution is therefore increasingly proposed and debated.

One of these changing realities is the (renewed) process of regional integration in various parts of the world. States transfer certain aspects of their national sovereignty to a supranational body,[3] such as the European Union (EU), or the African Union (AU). These regional institutions are created by states because they recognise that there are certain issues which they cannot adequately address independently.[4] A more communitarian international law is thus developing where states pursue most of their individual interests through multilateral institutions.[5] The strengthening of institutionalised cooperation is regarded as the key to achieving new stability within the

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2 *Ibid*. The Republic of South Sudan formally seceded from Sudan on 9 July 2011 and was admitted as the latest member state of the UN by the General Assembly on 14 July 2011 (see: http://www.un.org/en/members/index.shtml (last accessed August 2011)).

3 According to L Cram, D Desmond & N Nugent 'Reconciling theory and practice' in L Cram, D Dinan & N Nugent (eds) *Developments in the European Union* (1999) 5–6, the term *supranational* implies the existence of a power above or beyond the level of the nation-state enjoying a certain degree of autonomy from national governments. Also see S Villes 'The path to unity' in RJ Guttman (ed) *Europe in the new century: visions of an emerging superpower* (2001) 24.

4 K Mills 'Reconstructing sovereignty: a human rights perspective' 1997 *Netherlands Quarterly of Human Rights* 274. According to P Tangney 'The new internationalism: the cession of sovereign competences to supranational organisations and constitutional change in the United States and Germany' 1996 *Yale Journal of International Law* 400 these issues include 'nuclear proliferation; pollution and other global environmental issues; financial flows; refugees; transfers of technology; the trade, labor, consumer, and tax consequences of globalized production patterns; and criminal law problems including drug trafficking and gun control'.

5 B Simma & AL Paulus 'The "international community": facing the challenge of globalization' 1998 *European Journal of International Law* 276. I Simonovic 'Relative sovereignty in the twenty first century' 2002 *Hastings International and Comparative Law Review* 377–378 is of the opinion that international relations are experiencing a process of transformation. International relations are transforming from an exclusively state-dominated system where states are the holders of all the power into a more complex system where states, international organisations, multinational corporations and non-governmental organisations are sharing the balance of power. He explains as follows: 'This transformation is heavily influenced by the process of globalization. Global interdependence in security, trade, finance, crime, health and environmental issues limits the feasibility of state sovereignty as a viable solution to conflicts that arise. Consensual obligations, such as international treaties, are self-imposed limitations on state sovereignty … Citizens who have developed a feeling of global citizenship in addition to state citizenship, are seeking new ways to protect their interests. They prefer to have some of their interests protected on the state (central or local) level, and others protected on the regional (such as the EU or the AU) or global level.'

international system.[6] The objectives and structures of the UN and regional organisations often display similarities, and regional organisations regularly act within areas that were previously the monopoly of international institutions, specifically that of the UN. This overlap in authority may at times create uncertainty as to the exact relationship between the UN and regional alignments. This article evaluates to what extent the AU has progressed in its aim of continental regionalism and examines the impact that regionalism may have on the proposed restructuring of the UN. The article will in this regard focus on the AU with references to the EU where applicable.

Regionalism

In the literature on the subject, the changing nature of public international law is described by a variety of concepts, such as globalisation, global governance, and international constitutionalism. Globalisation specifically can be linked to the subject of this article, namely regionalism.

Globalisation and regionalism go hand in hand. Like globalisation, so-called *new* regionalism is a fairly recent development which rose to prominence in the mid-1980s in Europe and is slowly turning into a truly world-wide phenomenon.[7] The new wave of regionalism relates to the current transformation of the world order, and is associated with or caused by certain structural changes of and in the global system, including the restructuring of the nation-state and the growth of interdependence, transnationalisation, and globalisation.[8]

During the Cold War, nation states were the primary actors in regional alignments. These alignments were often imposed on states and in the main served the interests of the superpowers. Since then regionalism has become a spontaneous process emerging from below and from within the region itself, which involves not only nation states, but also a variety of non-state actors.[9] As such, the continued process of regionalism seems inevitable: the compelling pressures of globalisation on the various regions of the world mean that states will have to engage in a process of deepened regional cooperation or regionalisation in order to avoid the risk of marginalisation.[10]

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6 J Delbrück 'A more effective international law or a new "world law"? – Some aspects of the development of international law in a changing international system' 1993 *Indiana Law Journal* 706.

7 M Schulz, F Söderbaum & J Öjendal *Regionalization in a globalizing world: a comparative perspective on forms, actors and processes* (2001) 3.

8 *Ibid*.

9 *Id* at 3–4; JJ Hentz 'Introduction: new regionalism and the "theory of security studies"' in JJ Hentz & M Bøås (eds) *New and critical security and regionalism* (2003) 11–13; JH Mittelman 'Rethinking the "new regionalism" in the context of globalization' 1996 *Global Governance* 192.

10 Schulz, Söderbaum & Öjendal n 7 above at 263.

In its 2005 report the Commission on Global Governance also stressed that regional organisations should become an integral part of a more democratic system of global governance.[11]

Although both the proponents of universalism and the advocates of regionalism agree that the international system must be modified from the primacy of the nation state towards a partial surrender of state sovereignty to larger political units, they present different claims with regard to the superiority of the one approach over the other.[12] In this regard, regionalists advance the following reasons to substantiate a preference for regionalism over universalism:

- There is a natural tendency toward regionalism within smaller groups of neighbouring states, founded on the homogeneity of interests, traditions and values.
- Political, economic and social integration is more easily attainable among a smaller number of states within a particular geographic area than on a global basis.
- Regional economic cooperation provides more effective economic units that can compete successfully in world markets, which is not possible for smaller states.
- Local threats to the peace are (theoretically) more willingly and promptly dealt with by the states in that specific area than by states which are further removed and have little direct interest in the conflict.
- By grouping states in regional alignments, a global balance of power will be maintained and world peace and security promoted.
- As the world is not ready to establish a global authority capable of maintaining world peace and promoting world welfare, regionalism is the first step in establishing areas of consensus toward eventual (full) intergovernmental coordination or integration.
- The heterogeneity of political, economic, social and geographical factors throughout the world that militates against global unity can be more easily accommodated within a regional framework.[13]

In contrast, universalists advance the following claims for the superiority of universalism over regionalism:

- As a result of world interdependence there are an increasing number of political, economic and social problems reaching across regional boundaries that require global solutions.

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11 *Our global neighborhood: Report of the Commission on Global Governance* (1995) chapters 1; 14 (available at: http://humanbeingsfirst.files.wordpress.com/2009/10/cacheof-pdf-our-global-neighborhood-from-sovereignty-net.pdf (last accessed June 2011)).

12 A LeRoy Bennett & JK Oliver *International organizations: principles and issues* (7ed 2002) 237.

13 *Id* at 237–238.

- Regional resources are often inadequate to resolve the problems of states within the region.
- Only a world organisation can deal effectively with threats to the peace that may spread beyond local or regional limits.
- Only a universal organisation can adequately manage the power of a large state that can often dominate the other members of a regional arrangement.
- Sanctions imposed on an aggressor are often ineffective if applied on a regional basis, because of sources of aid to the aggressor from outside the region.
- Because regions are imprecise and impermanent, no agreement can be reached on a system of regions into which the globe can be conveniently divided.
- Regional alliances create the potential for rivalries and competition for military supremacy among regions, thus providing greater possibilities for major wars.
- The existence of numerous moderately successful universal organisations is indicative of the desire of governments to cooperate on a global basis without the necessity of using regional organisations as platforms for the gradual development of enlarged areas of consensus or community.[14]

During the negotiations surrounding the drafting of the UN Charter, this struggle between universalist and regionalist sentiments was prominent.[15] Although the Charter displays distinct universalist features, subsequent practice has indicated that more weight has been given to regionalism by the UN than the bare text of the Charter suggests. This move towards regionalism away from a predominantly universalist concept, is the result of a number of factors, which include the partial failure of the UN to address many of the tasks entrusted to it; the strong re-awakening of group solidarity among member states; the preference for dealing with certain problems in a smaller arena better equipped for cooperation; and finally, the attempt to escape the involvement of outside powers with global strategies.[16]

The composition, structure and decision-making processes of the UN display certain regionalist features. The General Assembly (GA), in particular, has adopted a group system for decision-making. These groupings have strong regional features since the composition of the group may be determined by geographical and cultural bonds (such as Latin America) or through membership of a regional organisation (such as the EU). Regional cooperation has also been formalised in the election and appointment processes of the GA

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14 *Id* at 238.

15 C Schreuer 'Regionalism v universalism' 1995 *European Journal of International Law* 478.

16 *Id* at 479.

where the election of the President, Vice-Presidents and Chairs of the Main Committees follows a regional pattern. [17]

The composition of the Security Council (SC) also displays a regionalist character through the allocation of the ten non-permanent seats to specific regions. The current debate on the restructuring of the SC not only includes demands for a better representation of certain regions, but even suggestions that genuine permanent and non-permanent regional seats should be created.[18]

Apart from the development of regionalism in the form of organisations for collective security, it is especially in the political and economic fields that greater progress may be made on a regional basis between states with fundamentally similar political and economic institutions. The UN itself has recognised this tendency by establishing five regional economic commissions for Europe, Africa, Asia-Pacific, Western Asia, and Latin America, respectively.[19]

The UN has also in the area of human rights protection encouraged regional arrangements to reinforce universal human rights standards and endorse efforts to strengthen these arrangements.[20]

From the above discussion it is clear that as an organisation the UN is not opposed to regionalism, indeed it may even be said to be actively promoting it. In this regard Schreuer[21] observes that:

> Regionalization within the United Nations has clearly served some useful purposes. Political groupings can play an important and beneficial role in any decision-making process. They add efficiency and structure to the complex process of communication, thereby facilitating compromise. Regional distribution of seats in political organs reduces the potential for conflict in the selection of Members and gives groups a more secure sense of representation.

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17 *Id* at 480.

18 *Ibid.*

19 P Sands & P Klein *Bowett's law of international institutions* (6ed 2009) 156.

20 Paragraph 37 of the Vienna Declaration and Programme of Action, World Conference on Human Rights (UN Doc A/CONF.157/23 (12 July 1993)) determines that '[r]egional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.' See further Schreuer n 15 above at 484.

21 Schreuer n 15 above at 481.

Although the UN Charter does not preclude the establishment of regional agencies in the economic and social spheres (which utility is widely recognised), the specific Charter provisions concerning regional arrangements are limited to the role of regional organisations in the maintenance of international peace and security.[22] This is in conformity with the principal aim of the UN, namely the maintenance of international peace and security. However, as will be pointed out later, the relationship between especially the peace and security provisions of the UN Charter and the constitutive documents of regional organisations, such as the AU, is not entirely clear.

The regionalisation process, specifically on the African continent, faces certain challenges which will have to be addressed in order for the AU to make a meaningful contribution to the restructuring of the UN. The challenges to the integration process in Africa include issues such as the politico-ideological divisions amongst African states as a result of colonialism and the Cold War; the promotion of nationalism once independence from the colonial powers had been achieved, often at the expense of regional interests; institutional weaknesses, including the lack of a united political will amongst African states as a result of the strong focus on nationalism; and the low level of economic and political development within many African states.[23]

Apart from continental regionalism in the form of the AU, clusters of African states in formal and informal alignments can also be identified.[24] Although these sub-regional alignments often primarily reflect regional issues, such as trade and investment, they may be expanded to ultimately include issues such as security, health, education, labour and population migration.[25] In Southern Africa, for example, the Southern African Development Community (SADC) has pursued an agenda of common interests based on economic development and integration of the region as a whole.[26] Unfortunately the competing

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22 LeRoy Bennett & Oliver n 12 above at 240.

23 BF Franke 'Competing regionalisms in Africa and the Continent's emerging security architecture' 2007 *African Studies Quarterly* 7–10.

24 See F Viljoen *International human rights law in Africa* (2007) 479–526 for a discussion of these sub-regional institutions.

25 WP Nagan & C Hammer 'The changing character of sovereignty in international law and international relations' 2004 *Columbia Journal of Transnational Law* 169.

26 The Southern African Development Community has been in existence since 1980 when it was known as the Southern African Development Coordination Conference (SADCC), with the main aim of coordinating development projects in order to lessen economic dependence on the then apartheid South Africa. The transformation of the organisation from a Coordination Conference into a Development Community took place on 17 August 1992 in Windhoek, Namibia, when the Declaration and Treaty were signed at a Summit of Heads of State and Government, thereby giving the organisation a legal character. For the full text of the Treaty of the Southern African Development Community see S Eborah & A Tanoh (eds) *Compendium of African sub-regional human rights documents* (2010) 339–345. The current member states of the Southern African Development Community (SADC) are Angola, Botswana, Democratic Republic of

interests of these sub-regional organisations have the potential to constrain African continental regionalism.[27] It is therefore essential that the initiatives of these sub-regional alignments are harmonised, integrated and coordinated into one coherent approach by the AU.[28]

One of the greatest hurdles on the path to unity and integration in Africa, however, remains the insistence of many African states to cling firmly to their sovereignty.[29]

The limitation of state sovereignty as a result of regionalism

The principle of absolute sovereignty of equal states came to be recognised as the foundation of modern international relations theory.[30] It is generally accepted that sovereignty is a fundamental principle of international law. States therefore often use this concept as a justification to demand non-intervention by other states in matters that they consider to fall in their exclusive jurisdiction.[31] However, due to the role of international and regional organisations and the influence of universal norms and values, the present idea of state sovereignty differs greatly from the classical understanding of sovereignty as absolute.[32] In an increasingly interdependent world where national boundaries are ever more permeable, traditional notions of

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Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe (see http://www.sadc.int/ (last accessed August 2011)).

27 Franke n 23 above at 9.

28 *Id* at 14.

29 GM Wachira 'Sovereignty and the "United States of Africa": insights from the EU' June 2007, ISS Paper 144, *Institute for Security Studies* 1.

30 *The Report of the Commission on Global Governance* n 11 above at 68 identifies the following three norms that stem from the principle of sovereignty: first, that all sovereign states, irrespective of their size, have equal rights. Second, that the territorial integrity and political independence of all sovereign states are inviolable. Third, that intervention in the domestic affairs of sovereign states is not permissible.

31 A Bodley 'Weakening the principle of sovereignty in international law: the international tribunal for the former Yugoslavia' 1999 *New York University Journal of International Law and Politics* 420–421. In the past the principle of sovereignty has often been misused by states. In this regard *The Report of the Commission on Global Governance* n 11 above at 69 notes that states have used sovereignty to shield themselves against international criticism of brutal and unjust policies and in the name of sovereignty they have denied their citizens free and open access to the world.

32 FX Perrez *Cooperative sovereignty from independence to interdependence in the structure of international environmental law* (2000) 46 explains the reason for this shift from the classical approach as follows: 'As it became apparent that the classical understanding of sovereignty as absolute was a threat to the international community, to international peace and to the maintenance of independent nation states itself, a new understanding of sovereignty and of international law emerged.' Also see N Schrijver 'The changing nature of state sovereignty' 1999 *The British Yearbook of International Law* 65; A Kotaite 'Is there a lessening of state sovereignty or a real will to co-operate globally?' 1995 *Air and Space Law* 288.

territoriality, independence and non-intervention are losing some of their meaning.[33] It is becoming more and more difficult to separate actions that have an exclusive effect on one state's internal affairs, from actions that have an impact on the domestic affairs of other states[34] and, therefore, to define the legitimate boundaries of sovereign authority. Consequently, states will have to accept that, particularly in respect of common global issues, sovereignty has to be exercised collectively.[35] The principle of sovereignty and the norms that derive from it must, therefore, be adapted in accordance with changing realities.[36] Specifically the need for state cooperation and interaction on a regional level will demand that states review and rethink the concept of state sovereignty.[37]

Globalisation and the growing interdependence between states with regard to issues such as trade, security, human rights and the environment, have resulted in the creation of international and regional organisations as instruments to regulate these and other issues of common interest. These institutions, often with supranational characteristics, provide a system of law that could 'pierce the veil of sovereignty and influence the internal affairs of states'.[38] Alvarez[39] points out that although some would prefer to describe international organisations as mere 'arenas' for lawmaking action, international organisations, and similarly, it is submitted, regional organisations, are for all practical purposes new lawmaking actors that are to some extent autonomous from the states that establish them. In this sense, international and regional organisations have a profound impact on the nature of state sovereignty by changing it into a status consideration. Traditionally,

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33 *The Report of the Commission on Global Governance* n 11 above at 68. CC Joyner *International law in the 21st century: rules for global governance* (2005) 292–293 maintains that the forces of globalisation and interdependence combine to make absolute sovereignty in the 21st century more fiction than fact, 'if for no other reason than the economic and political impracticability of operating in foreign relations among thousands of other international actors'.

34 For example, environmental policies made in the USA can have an effect on employment and pollution levels in Rio de Janeiro. See in this regard *The Report of the Commission on Global Governance* n 11 above at 70.

35 This also relates to the concept of *shared sovereignty*. According to E Duruigbo 'Pioneering models for shared sovereignty in weak states' in JI Levitt (ed) *Africa: mapping new boundaries in international law* (2008) 209 '[s]hared sovereignty … entails the engagement and participation of external actors on an ongoing basis in the management of otherwise sovereign functions through national institutions and in the formulation and implementation of domestic policy. It is instituted through a treaty, accord, compact or some form of contractual arrangement between domestic and external actors to oversee and govern some specific issue areas.'

36 *The Report of the Commission on Global Governance* n 11 above at 71.

37 Wachira n 29 above at 11.

38 Tangney n 4 above at 403.

39 JE Alvarez 'International organizations: then and now' 2006 *American Journal of International Law* 333.

a particular state realised and expressed its sovereignty by acting independently to achieve its goals.[40] Today, states transfer certain aspects of their national sovereignty to supranational bodies, and as a result the freedom of action of individual member states may be substantially diminished in these areas.[41] Although states formally limit their authority to make decisions in specific areas, the participation of states in regional and international organisations is increasingly viewed as 'sovereignty-strengthening', since it promotes the individual state's ability to gain access to new resources and secure other benefits needed to operate in a globalised world.[42] It is therefore argued that the exercise of sovereignty today in fact requires participation in international organisations and, it is submitted, regional organisations,[43] thereby changing sovereignty into a status consideration: the enjoyment of sovereignty is no longer measured by the degree of a state's autonomy but by the extent of its membership and participation in international and regional organisations.[44]

The recognition of regional arrangements in Chapter VIII of the UN Charter has provided the impetus for the establishment of various regional organisations since the end of the Second World War.[45] The member states of these regional groupings realised that they inevitably had to surrender some aspects of their sovereignty in promoting mutual national interests through united action.[46]

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40 A Chayes & A Handler Chayes *The new sovereignty: compliance with international regulatory agreements* (1995) 26.

41 Schrijver n 32 above at 76.

42 JE Alvarez *International organizations as law-makers* (2005) 616. Schrijver n 32 above at 71–72 remarks that 'external sovereignty is to a certain extent a fiction in an increasingly interdependent world in which States have to co-operate closely and are constantly compelled to make compromises … [T]o remain sovereign they [States] must co-operate, *inter alia*, through international organizations'. Perrez n 32 above at 40 is of the opinion that '[b]y transferring power to new international organizations, the states submit voluntarily to restrictions of their freedom and independence. Hence, these new international institutions further limit the radius of freedom of the states, and a new "supranational" structure emerges.' Joyner n 33 above at 36 notes that although a government, by participating in an international organisation, limits its state's formal authority to unilaterally prescribe and enforce certain decisions that affect its welfare, the state also gains from the relationship, since it consolidates access to new resources and legal opportunities and as it increases its role over other decisions affecting its national interests. Also see Bodley n 31 above at 422; J Delbrück 'Prospects for a "world (internal) law?" Legal developments in a changing international system' 2002 *Indiana Journal of Global Legal Studies* 406–407.

43 Alvarez n 42 above at 616.

44 Chayes and Handler Chayes n 40 above at 27. See further Alvarez n 39 above at 333.

45 For a discussion of the phenomenon of regionalism in Europe, the Middle-East, West Africa, Southern Africa, Caucasia and Central Asia, South Asia, Southeast Asia, East Asia, North America, The Caribbean and South America see Schulz, Söderbaum & Öjendal n 7 above at 22–249.

46 CG Weeramantry *Universalising international law* (2004) 109.

The AU as a regional organisation

In Africa, a renewed process of regionalisation[47] was set in motion when the Organisation of African Unity (OAU) was transformed into the AU in 2000 through the adoption of the Constitutive Act of the African Union.[48] The adoption of the Act signalled a turning point in the modern history of Africa and in its quest for political and economic unification of the African continent.[49] This is in accordance with the notion of Pan-Africanism which broadly determines that the effects of colonialism, alienation and marginalisation can be remedied by forging African unity.[50] The AU is loosely modelled on the EU and its objectives are aimed at enhancing political cooperation and economic integration amongst African states.[51] Although it would be premature to regard the AU as a carbon copy of its European

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47 Tangney n 4 above at 399–400 describes this process as a new 'internationalism' that is marked by the advent of supranational organisations. He maintains that since World War II much of international law has evolved into supranational law. According to him international law is deferential to the notion of absolute sovereignty of states while supranational law is law promulgated by institutions whose institutional decisions are binding and enforceable against states. Consequently, the definition of international law, as consisting of the voluntary agreements between sovereigns, is beginning to change. Tangney contends at 402 that '[i]ncreasingly, "international" law is supranational: it emanates from institutions whose decisions have binding force on nation-states and who can enforce their decisions. They are supranational rather than international because they are superior to nation-states in matters coming under their jurisdiction.' It is submitted that the process of regionalism should be included in this process of internationalism referred to by Tangney.

48 The Constitutive Act of the African Union was adopted at the 36th ordinary session of the Assembly of Heads of State and Government of the OAU on 11 July 2000 in Togo (see the Decision on the Establishment of the African Union, OAU Doc AhG/Dec 143 (XXXVI)). The AU was formally inaugurated in Durban, South Africa, on 9 July 2002. The AU consists of the member states that formally comprised the OAU, except for Morocco. For the text of the Constitutive Act of the African Union see C Heyns & M Killander *Compendium of key human rights documents of the African Union* (4 ed 2010) 4–12.

49 T Maluwa 'The Constitutive Act of the African Union and institution-building in postcolonial Africa' 2003 *Leiden Journal of International Law* 158.

50 T Murithi *The African Union: Pan-Africanism, peacebuilding and development* (2005)12. Pan-Africanism was initially essentially a movement of the former British colonies. Discussions after colonialism among the newly independent states on the possibility of co-operation and unity in Africa brought together sub-Saharan states, including the former French colonies and the Arab-North African states. According to Viljoen n 24 above at 161 '[i]n this context, pan-Africanism changed its hue and achieved an inclusive, yet mythical trans-Saharan character'.

51 Article 3 of the Constitutive Act of the African Union. See M du Plessis 'The African Union' in J Dugard *International law: a South African perspective* (3ed 2005) 549–550; N Steinberg *Background paper on the African Union* (2001) (available at: http://www nfm-igp.org/site/files/AU_background_doc.pdf (last accessed February 2012)); A Abass & MA Baderin 'Towards effective collective security and human rights protection in Africa: an assessment of the Constitutive Act of the African Union' 2002 *Netherlands International Law Review* 2–4. For a discussion of the historical background leading to the establishment of the AU see Maluwa n 49 above at 159–167.

counterpart, the experiences of the EU may, at least, give direction to future developments in Africa.

Historically, the concept of sovereignty has played a crucial role in the political development of African states. States that evolved from colonialism have been particularly sensitive to any limitation of their sovereignty and to the principle of non-intervention.[52] Due to the emphasis on a strong, pre-World War II version of sovereignty in Africa, the predecessor of the AU, the OAU, had a limited institutional capacity to constrain African sovereignty by enforcing regional legal obligations. Similarly, African human rights had weak support on intergovernmental level.[53] The process of decolonisation and the protection of sovereign independence was a priority for the OAU and the protection of human rights was accordingly regarded as a matter within the domestic jurisdiction of states.[54] This situation is, however, changing in the context of the AU with its aims of political, social and economic integration and the promotion and protection of human rights.[55]

According to Nagan and Hammer,[56] Africa is in the process of formulating a new idea of sovereignty in terms of continent-wide obligations, thus subordinating the sovereignty of African states to the continent's own constitutional and public order priorities and values. They call this reformulation of sovereignty cooperative sovereignty. By recognising the common interest in African governance, state and society are strengthened through principles of cooperation in the common interests of peace, human rights and development on a continent-wide base. The AU thus displays a greater political and juridical insistence on the principle of cooperative sovereignty as the foundation of a new form of governance on the African continent. However, notwithstanding the commendable objectives in the Constitutive Act, the human rights situation in many African states remains precarious. Factors such as armed conflict, under-development, extreme poverty, widespread corruption, ethnic and civil violence, and the HIV/AIDS pandemic contribute to the undermining of human rights on the continent. It seems that the AU is still in some respects falling short of its commitment to protect and promote human rights in Africa. This is especially evident in the Union's reluctance publicly to criticise African leaders who fail to protect

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52 Nagan & Hammer n 25 above at 167; Weeramantry n 46 above at 109.

53 Nagan & Hammer *id* at 169.

54 F Viljoen & E Baimu 'Courts for Africa: considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' 2004 *Netherlands Quarterly of Human Rights* 254.

55 See the Preamble as well as art 3(c) and art 3(h) of the Constitutive Act of the African Union.

56 Nagan & Hammer n 25 above at 169.

human rights.[57] These oppressive leaders also often find refuge in AU member states after the fall of their dictatorships.[58] Unfortunately this is reminiscent of the criticism often directed at the OAU as predecessor of the AU: essentially it operated as a club of heads of state supporting one another to remain in power and as a result failing to make genuine efforts to enforce human rights instruments and promote an agenda for human rights protection on the African continent.[59]

It has been suggested by some commentators that the transcendence of the predominantly Western idea of the nation state will promote peace-building and development in Africa. It is therefore proposed that the AU, with its drive towards pooling together the sovereignty of all African states, may lay the foundation for the process of establishing a checks-and-balance system to monitor and reduce the excesses of state power.[60] Depending on the extent to which African states transfer their sovereignty to the AU, this proposal can be interpreted to suggest the establishment of a sovereign African state, by pooling together the sovereignty of all African states, with the AU as its continental government. This would obviously require a commitment by African states to surrender substantial elements of their sovereignty to the Union. This idea is contrary to the approach in the EU, where the Union offers the hope of transcending the sovereign state rather than replicating it in a new super-state with absolute sovereignty.[61] It is at this stage, at least, doubtful whether African states would be willing to accede to such a far-reaching limitation of their sovereignty. In view of the cultural and religious differences in Africa specifically, the creation of a 'United States of Africa' will be a long and gradual process in which sub-regional organisations, if properly coordinated and integrated into the continental regional system, may play an indispensable role.[62] The AU in its current form

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57 See Amnesty International Report (2007) available at: http://archive.amnesty.org/report2007/ (last accessed February 2012).

58 For example, Menghitsu Hailemariam of Ethiopia who is living in exile in Zimbabwe; Charles Taylor of Liberia who lived in exile in Nigeria before his indictment by the Special Court in Sierra Leone; Mobutu Sese Seko of Congo who died in exile in Morocco, a non-member state, in 1997 and Hissène Habré of Chad who is living in exile in Senegal. The AU initially insisted that Senegal either try Habré or extradite him to Belgium who has offered to try the Chadian leader for alleged human rights abuses (see *Legalbrief* 4 July 2011; *Legalbrief* 5 July 2011). Following a request by the AU, the government of Rwanda has however subsequently agreed to try Habré (see *Legalbrief* 10 October 2011).

59 Murithi n 50 above at 27; A Mangu 'The African peer-review mechanism and the promotion of democracy and good political governance in Africa' 2007 *South African Yearbook of International Law* 22.

60 Murithi *id* at 45.

61 K Schiermann 'Europe and the loss of sovereignty' 2007 *International and Comparative Law Quarterly* 487.

62 See also MP Ferreira-Snyman 'Regional organisations and their members: the question of authority' 2009 *CILSA* 188–190.

cannot be regarded as a federal or confederal political entity to which member states have ceded their sovereignty.[63] This is also evident from the fact that the principles of the territorial sovereignty and independence of its member states are repeatedly confirmed in the documents of the AU.[64]

However, what remains clear is that the member states of the AU will have to transfer some sovereign powers to the Union in order to achieve the common objectives set out in its Constitutive Act.[65]

Objectives and aims of the AU and the UN

As was mentioned at the outset of this article, the objectives and structures of the UN and regional organisations often display similarities and many of the functions traditionally assigned to the UN are increasingly also exercised by regional organisations. This overlap in authority may create uncertainty regarding the exact relationship between the UN and regional alignments.

A comparison of these objectives of the AU and the UN shows a clear overlap, especially in the areas of human rights protection, economic cooperation and the maintenance of peace and security.[66] For the rest, the objectives of the AU are more detailed with a clear regional focus and need to be realised through the practical functioning of its organs. In what follows, reference will be made to the most important of these organs.

Pan-African Parliament

As was pointed out earlier, regional organisations are described as new law-making actors which are to some extent autonomous from the states that establish them. In the case of the AU, the Pan-African Parliament (PAP)[67] is envisaged as something similar to a legislature for Africa, and intended to secure the democratic legitimacy of the integration process on the African continent by ensuring 'the full participation of African peoples in the

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63 C Heyns, E Baimu & M Killander 'The African Union' 2003 *German Yearbook of International Law* 263; T Maluwa 'Reimagening African unity: some preliminary reflections on the Constitutive Act of the African Union' 2001 *African Yearbook of International Law* 9.

64 For example, the Constitutive Act of the African Union lists as one of its objectives to'defend the sovereignty, territorial integrity and independence of its Member States'.

65 Wachira n 29 above at 12.

66 See art 3 of the Constitutive Act of the African Union and art 3 of the United Nations Charter for these objectives.

67 Established by the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament Doc EAHG/Dec 2 (V) adopted at the 5th extra-ordinary session of the OAU, Sirte, Great Jamahiriya (2001). The PAP was inaugurated on 18 March 2004 and sits at Gallagher Estate in the Gauteng province of South Africa. The full text of the Protocol to the PAP is available at: http://www.au.int/en/treaties (last accessed August 2011).

development and economic integration of the continent'.[68] The PAP is modelled on the EU's Parliament, which plays a central role in ensuring the democratic nature of the EU, and similar to its European counterpart, it has the objective of promoting 'the principles of human rights and democracy',[69] and 'encourag[ing] good governance, transparency and accountability in member states'.[70] It is suggested that it would be in the interest of the democratic legitimacy of the PAP as an elected body to grant it primary legislative powers. Unlike its European counterpart, the AU does not, however, at this stage have the power to issue directives which are legally binding on member states.[71]

Also contrary to the position in the EU, neither the Constitutive Act of the African Union, nor the Protocol establishing the PAP makes any reference to the principle of subsidiarity in the context of the relationship between the Union and its member states. The principle of subsidiarity,[72] as applied to the relationship between the EU and its member states,[73] requires that legislation be adopted at member-state level, unless there is a good reason for adopting it at the Community level.[74] As such, the principle of subsidiarity relates closely to democracy, as the latter requires that decisions should be taken as closely as possible to the citizen.[75] The principle of subsidiarity is, however,

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68 Article 17 of the Constitutive Act of the African Union. Also see Maluwa n 49 above at 168.

69 Article 3(2) of the Protocol on the Pan-African Parliament.

70 Article 3(3) of the Protocol on the Pan-African Parliament.

71 According to Heyns, Baimu & Killander n 63 above at 263 this situation is not likely to change without a major revision of the Constitutive Act. They, however, correctly recognise the area of human rights as an exception where continental supervision is increasingly accepted.

72 For a concise overview of the historical development of the principle of subsidiarity see PG Carozza 'Subsidiarity as a structural principle of international human rights law' 2003 *American Journal of International Law* 40–42.

73 See Ferreira-Snyman n 62 above at 191–199 on the application of the principle of subsidiarity in the EU.

74 Article 5 [3b] was added to the European Community Treaty by the Treaty on European Union (Maastricht Agreement) and the second paragraph reads as follows: 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.' The principle of subsidiarity is also confirmed in the Treaty Establishing a Constitution for Europe (TEC) (available at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:en:HTML (last accessed August 2011)). Article I–11(1) provides that the use of Union competences is covered by the principles of subsidiarity (art 1–11(3)) and proportionality (art 1–11(4)). Also see Hartley *European Union law in a global context: text, cases and materials* (2004) 60–61.

75 AL Paulus 'Subsidiarity, fragmentation and democracy: towards the demise of general international law?' in T Broude & Y Shuval (eds) *The shifting allocation of authority in international law: considering sovereignty, supremacy and subsidiarity* (2008) 194.

enunciated with reference to the relationship between the AU and the UNSC by acknowledging the supreme authority of the latter in matters of peace and security.[76] In order to find a balance between the task of the PAP to work towards the harmonisation and coordination of the laws of the member states,[77] and, on the other hand, the AU's commitment to the participation of the African people in the activities of the Union, which *inter alia* implies that decisions should be taken as closely as possible to the citizen, it is submitted that it is essential for the AU clearly to define the requirements of and the legislative areas reserved for the exclusive jurisdiction of the Union.[78]

The PAP shall be vested with legislative powers as defined by the Assembly, but during the first five years of its existence, the parliament has consultative and advisory powers only.[79] Although this five-year period had already passed, the parliament has to date not been granted its envisaged legislative power. It is the principal aim of the PAP 'to evolve into an institution with full legislative powers, whose members are elected by universal adult

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76 Article 17(1) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted by the 1st Ordinary Session of the Assembly of the African Union, held in Durban, South Africa, 9 July 2002 (available at http://www.au.int/en/treaties (last accessed August 2011)). Also see B Møller *The pros and cons of subsidiarity: the role of African regional and subregional organizations in ensuring peace and security in Africa* (Danish Institute for International Studies, Working paper no 2005/4) 29.

77 Article 11 of the Protocol on the Pan-African Parliament.

78 The preamble of the Treaty on European Union (Maastricht Treaty), which formally introduced the principle of subsidiarity into EU law, determines that the member states are 'resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'.

79 Article 11 of the Protocol on the Pan-African Parliament. With regard to the different types of legislation that may be issued by the Assembly and the Executive Council of the African Union, see Rule 33 of the Rules of Procedure of the Assembly (available at: http://www.africa-union.org/rule_prot/rules_Assembly.pdf (last accessed August 2011)) and Rule 34 of the Rules of Procedure of the Executive Council (available at: http://www.africa-union.org/rule_prot/exec-council.pdf (last accessed August 2011)). *Regulations* issued by the Assembly and the Executive Council are applicable in member states. All necessary measures must be taken to implement them. In the case of regulations by the Assembly, member states must take all necessary measures to implement them and in the case of regulations by the Executive Council, national laws shall, where appropriate be aligned accordingly. *Directives* issued by the Assembly and the Executive Council only bind the member states to the objectives to be achieved while leaving it to the national authorities of the member states to determine the means to be used for their implementation. *Recommendations, Declarations, Resolutions* and *Opinions* are not binding, but are intended to guide and harmonise the viewpoints of the member states. The non-implementation of regulations and directives by the member states shall attract appropriate sanctions in accordance with art 23 of the Constitutive Act of the African Union.

suffrage'.[80] Whether this provision implies that the PAP will eventually have supranational prerogative power over national parliaments is, however, not clear. At the Second Meeting of Legal Experts and Parliamentarians on the Establishment of the African Union and the Pan African Union,[81] it was submitted that if the PAP was to be vested with such supranational powers, the nature of the executive branch that would enforce its legislative enactments needs to be defined. In the absence of such an executive branch, it may be assumed that the PAP, for the moment at least, will not exercise supranational legislative powers.[82] The AU has the explicit aims of achieving unity and solidarity between African states and the peoples of Africa,[83] to accelerate the political and socio-economic integration on the continent[84] and to harmonise and coordinate the laws of the member states. In view of these aims one can expect that the PAP will eventually need to be granted supranational legislative power and that the member states, as with the member states in the EU, will have to apply the legislation of the PAP directly in their domestic systems.

On an international level, the UN does not have legislative authority similar to that of regional parliaments. Neither of the two main political organs of the UN, namely the GA and the SC, performs a legislative function.[85] The GA, which consists of all the members of the UN, meets annually to discuss international problems and has only a secondary responsibility for the maintenance of international peace. The Assembly can however adopt only non-binding resolutions on matters affecting the maintenance of international

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80 Article 2(3) of the Protocol on the Pan-African Parliament. This is similar to the practice in the EU. Article 190(4) of the European Community Treaty allows the European Parliament to draw up a procedure 'for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with the principles common to all Member States'. Currently, each member state of the PAP is represented by five appointed members who are elected by and among members of their respective national parliaments or deliberative organs (art 4(3)), and this representation must reflect the 'diversity of political opinions in each National Parliament or other deliberative organs'. The current election procedure can only be changed by an amendment of the Protocol on the Pan-African Parliament after ratification by two-thirds of the member states of the AEC. Heyns, Baimu and Killander n 63 above at 270 point out that the indirect election of the PAP is problematic, since many national parliaments in Africa do not have democratic credentials. However, the process to establish a directly elected African Parliament with legislative powers will not only be cumbersome, but continent-wide elections will also be costly, considering the fact that many African states can barely fund their own national elections.

81 OAU, Report of the Second Meeting of the Legal Experts and Parliamentarians on the Establishment of the African Union and the Pan African Parliament, 27–29 May 2000, SIRTE/Exp/RPT (II), Tripoli 2000a.

82 NJ Udombana 'The institutional structure of the African Union: a legal analysis' 2002 *California Western International Law Journal* 102.

83 Article 3(a) of the Constitutive Act of the African Union.

84 Article 3(c) of the Constitutive Act of the African Union.

85 Dugard n 51 above at 3.

peace and the settlement of disputes.[86] The SC, which has the primary responsibility for the maintenance of international peace and security, is composed of fifteen members of which five are permanent and ten non-permanent. The SC has the power to take decisions that are binding on all of the member states of the UN.[87] The effectiveness of the SC is however undermined by the veto power of the five permanent members. The undemocratic structure of the SC, the absence of a parliamentary procedure, and the veto power of the five permanent members are clear indications that this body cannot be regarded as an international legislature, as some commentators suggest.[88]

At first glance, it thus seems that regional organisations, with their established legislative organs, have already evolved further than the UN as regards lawmaking. It should however be pointed out that the PAP, as opposed to its European counterpart, is at present still underdeveloped. As the parliament will eventually be vested with legislative powers, it is essential that issues such as the direct legal effect and supremacy of AU law and the principle of subsidiarity will have to be included and clarified in the Protocol establishing the PAP.[89] In order to promote the ideal of harmonising and coordinating the laws of the member states, individual states will have to accept a monist approach and directly apply the legislation of the PAP in their domestic systems.[90] This implies that African states will have to accept the existence of a supranational legislative system in the form of the PAP, as the effective execution of its competencies is dependent on member states ceding some of their sovereign legislative powers to the regional legislature.[91]

African regional court(s)

Depending on the circumstances, the adjudication of cases involving African states or individuals may currently be conducted on either the international, regional, or domestic level.

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86 *Id* at 481–485 on the functioning of the GA.

87 *Id* at 485–495 on the structure and functions of the SC.

88 S Talman 'The Security Council as world legislature' 2005 *American Journal of International Law* 175; BS Duijzentkunst 'Interpretation of legislative Security Council resolutions' 2008 *Utrecht Law Review* 188–209. Dugard n 51 above at 485 describes the SC as the 'executive body' of the UN.

89 See MP Ferreira-Snyman n 62 above at 201–206 on the issues of *supremacy, direct effect* and *direct applicability* as applied in the context of the EU.

90 For states favouring a monist approach, the domestic courts will be able to apply the obligations of AU law directly without any preceding formal enactment, but for states with a dualist tradition the legislative measures of the Africa Parliament will have to be incorporated in the domestic law in order to become applicable. See further Ferreira-Snyman n 62 above at 208.

91 Wachira n 29 above at 5; 8.

The establishment of the African Court of Human and Peoples' Rights (ACHPR) and the African Court of Justice (ACJ) of the AU on a regional level, is in conformity with the broader global process of creating international (and regional) adjudicatory bodies.[92] In 2004 the Assembly of Heads of State and Government decided that the ACJ and the ACHPR should be integrated into one court.[93] In terms of the Protocol on the Statute of the African Court of Justice and Human Rights[94] a single judicial institution, the African Court of Justice and Human Rights (ACJHR), will be established as the main judicial organ of the AU.[95] The Protocol will enter into force thirty days after the deposit of the instruments of ratification by fifteen member states of the AU. However, at the end of January 2011, only three of the fifty-four member states of the AU had satisfied this requirement.[96]

In Europe, the European Court of Human Rights (ECHR) is entirely distinct from the European Court of Justice (ECJ).[97] While the ECHR adjudicates all cases concerning the interpretation and application of the European Convention on Human Rights, the ECJ has jurisdiction over Community law. It is, however, not necessarily appropriate that the existence of two separate courts in Europe be replicated in Africa. Contrary to the African courts which will both function within the ambit of the AU,[98] the European regional courts are based on different institutional frameworks, namely, the Council of Europe[99] and the EU. It may therefore be argued that it would be more sensible for the AU to have one adjudicatory body for disputes arising from increasing political and regional cooperation.[100] It should, however, be cautioned that the merger of the two African regional courts poses the risk that if the ACHPR is absorbed by the ACJ, human rights issues will be

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92 Viljoen & Baimu n 54 above at 243; 243 fn 8. These adjudicatory bodies *inter alia* include the International Criminal Court, the ad hoc criminal tribunals for Rwanda and the former Yugoslavia and the World Trade Organisation's Dispute Settlement Mechanism.

93 See AU Doc.Assembly/AU/Dec.45(III) (July 2004) at par 4.

94 Available at: http://www.au.int/en/content/protocol-statute-african-court-justice-and-human-rights (last accessed May 2011).

95 Article 2 of the Statute of the African Court of Justice and Human Rights.

96 These three states are Burkina Faso, Libya and Madagascar. See *List of countries which have signed, ratified / acceded to the Protocol on the Statute of the African Court of Justice and Human Rights* (available at: http://www.au.int/en/treaties (last accessed May 2011)).

97 Hartley n 74 above at 276.

98 Viljoen n 24 above at 459.

99 The Council of Europe should not be confused with the EU. The Council of Europe was founded in 1949 as the original European organisation. All fifteen member states of the EU are members of the European Council. See Hartley n 74 above at 3.

100 Viljoen & Baimu n 54 at 253–254. Viljoen n 24 above at 459 supports the merger of the two courts on condition that the autonomy of the Human and Peoples' Rights section is guaranteed.

relegated to the periphery.[101] Some authors therefore maintain that a specialised human rights court is not only more effective in adjudicating human rights matters, but that such a specialised court will probably be more credible to the victims of human rights violations in Africa.[102] Considering the prevalence of human rights violations in Africa, it is submitted, in agreement with this view, that a separate and exclusive human rights court should be retained.

In the instance of a violation of a human right guaranteed by the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the parties concerned, the following entities may submit cases to the court: state parties to the Protocol; the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organisations accredited to the Union or its organs; and African National Human Rights Institutions.[103] Individuals or Non-Governmental Organisations (NGOs) accredited to the AU or its organs, may submit cases to the court subject to the provisions of article 8 of the Protocol. Similar to the protocol on the single ACHPR, article 8 seems to require that member states make a declaration accepting the competence of the court to receive cases from individuals and NGOs. This is regrettable, especially in view of the important role that NGOs play in the protection and promotion of human rights. It is unlikely that all African states will make such a declaration assisting individuals and NGOs to hold them accountable for human rights violations. As a result, access to the human rights section of the court will remain closed for a vast number of human rights victims in Africa.[104] In the EU any person, including NGOs and groups of individuals (including companies), may bring proceedings before the ECHR against a

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101 Viljoen & Baimu *id* at 254–255.

102 Udombana n 82 above at 112 proposes, as possible solutions to the problem of two potential conflicting regional courts in Africa, that the ACHPR either be absorbed by the ACJ or that the mandate of the Human Rights Court be expanded to include interpretation of the African Union Constitutive Act and that the establishment of the ACJ, therefore, be halted.

103 Article 30 of the Statute of the African Court of Justice and Human Rights.

104 The Protocol on the African Court of Human and Peoples' Rights contains a similar provision. Article 5(3) of the Protocol provides that '[t]he Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with art 34(6) of this protocol', which requires that states parties must make a declaration accepting the competence of the court to receive cases under art 5(3). See further Du Plessis n 51 above at 567; AP van der Mei 'The new African Court on Human and Peoples' Rights: towards an effective human rights protection mechanism for Africa?' 2005 *Leiden Journal of International Law* 121 on art 5(3) of the Protocol on the African Court of Human and Peoples' Rights.

party to the European Convention on Human Rights.[105] The right of individuals to bring a case directly before the ECHR for the alleged infringement of their human rights by a state party to the Convention not only increases the effectiveness of the Convention as a human rights instrument, but is also regarded as one of the advantages of international (and regional) adjudication.[106] In the EU both legal and natural persons have played an important role as guardians of the European legal order and the evolution of EU law.[107] The interpretation and application of the objectives of the AU by the member states in their national jurisdictions may have an effect on the rights of individuals and legal persons. In view of the objective of the AU to promote democracy and good governance,[108] it is submitted that individuals, NGOs and even multi-national enterprises should be able to approach the court on matters relating to the interpretation of the Constitutive Act.[109]

The decisions of the court will be final and binding on the parties.[110] Whether this means that the decisions of the court will be binding on the domestic courts of the members states (as is the case with the ECJ) is not entirely clear. It may be argued that by ratifying the Constitutive Act and its protocols, the member states recognise the AU as a supranational institution that can make decisions binding on its members. The decisions of the ACJHR will therefore create binding norms for the member states of the AU.[111] How the court will interpret and apply the Constitutive Act – according it either a wide or restrictive interpretation – may have significant implications for the sovereignty of the member states.[112]

On an international level, the International Court of Justice (ICJ), established by the Charter of the UN as the principal judicial organ of the UN, may be regarded as the primary international adjudicatory body.[113] Apart from

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105 Hartley n 74 above at 281.

106 *Id* at 3; 281.

107 Udombana n 82 above at 110.

108 Article 3(g) of the Constitutive Act of the African Union.

109 According to art 29 of the Statute of the African Court of Justice and Human Rights the following entities shall be entitled to submit cases before the court on an issue or dispute that fall within the jurisdiction of the court as provided for in art 28: 'Parties to the Protocol; the Assembly, the Parliament and other organs of the Union authorised by the Assembly; a staff member of the AU on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.'

110 Article 46 of the Statute of the African Court of Justice and Human Rights.

111 See Udombana n 82 above at 129 for a similar opinion on the binding nature of the decisions of the single ACJ. The remarks in fn 90 here above on a dualist or monist approach obviously equally apply in this case.

112 *Id* at 106.

113 Article 1 of the Statute of the International Court of Justice and art 92 of the United Nations Charter. See A Zimmermann C Tomuschat, Oellers-Frahm (eds) & CJ Tams, T Thienel (assistant eds) *The Statute of the International Court of Justice: a commentary*

hearing disputes between states, termed contentious issues, the court may also give advisory opinions.[114] Only states may be parties to cases before the court.[115] The ICJ thus far strictly adhered to the principle of consent as the basis of its jurisdiction. It has, however, been suggested in the Report of the Commission on Global Governance that the ICJ (the so-called World Court) should immediately be granted compulsory jurisdiction by all states. Should this not be possible, areas of jurisdiction should be identified in which acceptance of the court's compulsory jurisdiction could be achieved on a step by step basis.[116] Although African states increasingly make use of the ICJ to settle their disputes,[117] there is some doubt with regard to their commitment to comply with the decisions of the court. A case in point is the decision of the Federal Court in Nigeria to grant an injunction preventing Nigeria from handing over the oil rich peninsula of Bakassi to Cameroon in accordance with a ruling of the ICJ.[118]

In order to allow for the adjudication of international crimes, the majority of states[119] that attended the Rome Conference on 17 July 1998 adopted the Statute of the International Criminal Court (ICC).[120] There are currently 119 states party to the Rome Statute.[121] Because internal conflicts in African states often result in the crimes which fall within the jurisdiction of the ICC and

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(2006) for a comprehensive discussion of the Statute of the International Court of Justice.

114 Article 96 of the United Nations Charter and art 65 of the Statute of the International Court of Justice. The court may give advisory opinions at the request of the GA, the SC, and other organs of the UN and specialised agencies that have received such authorisation by the GA. Individual states are however not entitled to request an advisory opinion. C Tomuschat 'Article 36' in Zimmermann *et al* n 113 above at 597 attributes this to the fact that, in view of the large membership of the UN, the court would be overburdened if advisory opinions were also opened to individual states.

115 Article 34(1) of the Statute of the International Court of Justice.

116 *The Report of the Commission on Global Governance* n 11 above at 316–318.

117 Dugard n 51 above at 472.

118 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* 1998 ICJ Reports 275; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Preliminary objections (Nigeria v Cameroon)*, Judgment of 25 March 1999, (available at: www.icj-cij.org (last accessed February 2012)). Also see *Legalbrief* 4 August 2008.

119 Of the 120 countries that voted to adopt the treaty for the establishment of the International Criminal Court only seven states voted against it, including China, Israel, Iraq and the United States, and twenty-one countries abstained. See M du Plessis 'International Criminal Courts, the International Criminal Court, and South Africa's implementation of the Rome Statute' in Dugard n 51 above at 177.

120 Rome Statute of the International Criminal Court (UN Doc A/CONF.183/C.1/L.76/Add2). For a discussion of the background leading to the eventual establishment of the ICC see Du Plessis n 119 above at 174–178.

121 International Criminal Court – The States Parties to the Rome Statute (available at http://www.icc-cpi.int/Menus/ASP/states+parties/ (last accessed October 2011)).

because six situations currently before the court concern Africa,[122] it is interesting to note how many African states have actually ratified the Rome Statute. Of the fifty-four member states of the AU, thirty-three have ratified the Statute.[123] This makes Africa the most represented region in the Assembly of States.[124] The relatively large number of states that has ratified the Rome Statute creates the impression that African states endorse the ICC. However, the slow pace with which the Statute has been implemented domestically, and the apprehensiveness of African states to accept the jurisdiction of the court in cases involving African leaders, may indicate the reluctance of African states to subject their sovereignty to an international adjudicatory body.

The jurisdiction of the court covers genocide, crimes against humanity, war crimes, and the crime of aggression.[125] The principle of complementarity, which is the cornerstone of the jurisdiction of the ICC, serves as a restriction on the exercise of its jurisdiction in order to protect the sovereignty of states.[126] This principle, as enshrined in article 17 of the Rome Statute, determines that the court will only be able to exercise its jurisdiction in instances where a national judicial system (including that of a non-party state)

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122 Coalition for the International Criminal Court, Africa (Sub-Saharan) (available at: http://www.iccnow.org/?mod=region&idureg=1 (last accessed October 2011)).

123 International Criminal Court – The States Parties to the Rome Statute (available at: http://www.icc-cpi.int/Menus/ASP/states+parties/ (last accessed October 2011)). For a list of the African states parties to the Rome Statute see International Criminal Court – African States (available at: http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/ (last accessed October 2011)).

124 Coalition for the International Criminal Court – Africa (sub-Saharan) (available at: http://www.iccnow.org/?mod=region&idureg=1 (last accessed October 2011)).

125 See art 5 to art 8 of the Rome Statute of the International Criminal Court; Res RC/Res.6 (11 June 2010) (available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last accessed June 2011)).

126 Article 1 of the Rome Statute determines that the ICC 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern … and shall be complementary to national criminal jurisdictions'. Also see in general CL Siriam 'Universal jurisdiction: problems and prospects of externalizing justice' 2001 *Finnish Yearbook of International Law* 69–70; E La Haye 'The jurisdiction of the International Criminal Court: controversies over the preconditions for exercising its jurisdiction' 1999 *Netherlands International Law Review* 4, 8; M Boot-Matthijssen 'The International Criminal Court and international peace and security' 2003 *Tilburg Foreign Law Review* 523–525; A Cassese *International criminal law* (2ed 2008) 343 identifies two reasons for the inclusion of the complementarity principle in the Rome Statute: firstly, in the light of the limited number of judges, resources and infrastructure of the court, states considered it to be more practical to leave the vast majority of cases to the jurisdiction of national courts. Secondly, it seems that states, as a matter of principle, intended to respect state sovereignty as far as possible. In this regard F Gioia 'State sovereignty, jurisdiction, and "modern" international law: the principle of complementarity in the International Criminal Court' 2006 *Leiden Journal of International Law* 1096 points out that there seems to be some concern that the ICC 'still pays too great a tribute to state sovereignty' in the form of the complementarity principle.

is 'unwilling or unable' to investigate or prosecute the perpetrators.[127] National jurisdictions thus have primacy to exercise jurisdiction over genocide, crimes against humanity and war crimes. Should a national judicial system therefore indicate that it is appropriately dealing with cases concerning these crimes, the ICC is required under the Statute to decline to exercise jurisdiction.[128]

To date, both the Sudan and Kenya (the latter with one of the best judiciaries in Africa) unsuccessfully relied on the complementarity principle and their requests to the UNSC, with the support of the AU, for the deferral of their respective cases to allow domestic mechanisms to investigate and prosecute the alleged human rights violations,[129] were denied.[130]

In a further step to prosecute alleged perpetrators of human rights abuses on the African continent, a Pre-trial Chamber of the ICC recently issued arrest warrants against the Libyan leader, Colonel Muammar Gaddafi, and two of his senior officials for committing crimes against humanity during the current military crisis in Libya.[131] This step by the court was met with similar opposition from the AU, which had continuously stressed during the military

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127 By referring to the wording in art 17 and art 18(1) of the Rome Statute, Du Plessis 'Seeking an international International Criminal Court – Some reflections on the United States opposition to the ICC' (available at: http://www nu.ac.za/law/SeminarPapers htm (last accessed January 2004)) at 19 reaches the conclusion that the complementarity principle equally applies to states parties and non-party states. Article 17 does not refer to 'states parties', but provides that the Criminal Court shall determine that a case is inadmissible when it is being investigated or prosecuted by 'a State which has jurisdiction over it'. Article 18(1) determines that all states parties, as well as 'those States, which taking into account the information available, would normally exercise jurisdiction over the crimes concerned', must be notified by the Prosecutor of the intention to initiate an investigation. Therefore, if a national of a non-party state is accused of committing a crime on the territory of a state party, the Criminal Court will only be able to exercise its jurisdiction if neither of these two states have the ability or willingness to prosecute.

128 *Id* at 17–18.

129 Article 16 of the Rome Statute makes provision for the deferral of investigations and prosecutions by determining that '[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of twelve months after the SC, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect; that request may be renewed by the Council under the same conditions'.

130 M du Plessis & C Gervers 'Kenyan ICC cases a good test of an ICC founding principle' *EJIL Talk! – Blog of the European Journal of International Law* 8 Feb 2011 (available at: http://www.ejiltalk.org/kenyan-case-a-good-test-of-an-icc-founding-principle/ (last accessed June 2011)).131 See Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi , ICC-01/11 (27 June 2011).

131 See Decision on the Prosecutor's Application Pursuant to Article 58 as to the Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi, ICC-01/11 (27 June 2011) .

crisis in Libya, that the solution lay in peaceful means and urged all parties involved to refrain from actions targeting senior Libyan officials.[132] In July 2011, during its Summit in Equatorial Guinea, the AU therefore called on its members to ignore the arrest warrant issued by the ICC as it seriously complicates the AU's efforts to find a political solution for the crisis in Libya.[133]

These developments are indicative of the reluctance of African states unconditionally to accept the jurisdiction of international courts and their view that these issues should be dealt with on a regional level. However, since the ACJHR does not have the jurisdiction to try individuals, the alleged perpetrators of human rights violations on the African continent have to be tried either by the ICC, or the case must be deferred to a domestic court. To date, the SC has, however, denied all deferral requests by African states, which are often associated with a pattern by these states of seeking deferrals in cases where political elites are implicated. This has contributed to tensions between the ICC and Africa.[134] The continued insistence by African states that alleged human rights violators be investigated and prosecuted on a regional level necessitates the establishment of a regional criminal court. The effective operation of such a proposed criminal court and the already established ACJHR will, however, ultimately depend on the willingness of states to cede some of their sovereign judicial powers to a regional judicial organ, and to accept its decisions as binding. If not, the regional court might face the same fate as the SADC Tribunal which was recently (for all practical purposes) dissolved due to pressure from Zimbabwe which refused to enforce the Tribunal's judgments.[135]

Peace and Security Council of the AU

In contrast with the OAU's inability to intervene in states to end gross and massive human rights violations committed on the African continent,[136] the Constitutive Act of the African Union has moved much further towards limiting the sovereignty of member states and, even, in some instances, permitting the involvement of the Union in the domestic affairs of Uganda and in the Central African Republic, irrespective of the principle of

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132 See Communiqué of the 275th Meeting of the Peace and Security Council, 26 April 2011, Addis Ababa, Ethiopia (PSC/MIN/COMM.2(CCLXXV)) at para 11.

133 *Legalbrief* 4 July 2011.

134 Du Plessis & Gervers n 130 above.

135 *Legalbrief* 24 June 2011.

136 For example, the excesses of Idi Amin in Uganda and Bokassa in the Central African Republic in the 1970's, and the Rwandan Genocide in 1994. See in this regard B Kioko 'The right of intervention under the African Union's Constitutive Act: from non-interference to non-intervention' December 2003 *International Review of the Red Cross* 812–814. Also see Udombana n 82 above 76.

non-interference by member states in the internal affairs of others.[137] Article 4(h) of its Constitutive Act confers an institutional right,[138] but not a duty, on the AU to intervene in the conflicts of member states[139] in certain grave circumstances, namely war crimes, genocide and crimes against humanity.[140] The fact that the Constitutive Act expressly lists the grounds for intervention would probably prevent the uncertainties associated with the more broadly formulated mandate of the UNSC. The Protocol on Amendments to the Constitutive Act of the African Union, adopted in February 2003, but not yet in force, amends article 4(h) by extending the right of the Union to intervene in a member state to include instances of 'a serious threat to the legitimate order to restore peace and stability to the Member State of the Union upon recommendation of the Peace and Security Council'.[141] The expansion of

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137 Article 4(g) of the Constitutive Act of the African Union. Du Plessis n 51 above at 557. Some commentators (see for example E Baimu 'The African Union: hope for better protection of human rights in Africa?' 2001 *African Human Rights Law Journal* 314; Viljoen & Baimu n 54 above at 248) are concerned that the principle of non-interference has been retained in the Constitutive Act of the African Union. Article 4(g) of the Constitutive Act of the African Union confirms the principle of non-interference by any member state in the internal affairs of another. However, art 4(h) limits the right to non-intervention by making provision for the 'right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. F Viljoen 'The African Charter on Human and Peoples' Rights / The *travaux préparatoires* in the light of subsequent practice' 2004 *Human Rights Law Journal* 326 is of the opinion that the Constitutive Act of the African Union signals a clear trend away from strict adherence to the principle of non-interference in the domestic affairs of member states. Kioko n 136 above at 819 maintains that the AU has moved away from the principle of non-interference or non-intervention to, what he refers to as, the doctrine of 'non-indifference'. He refers in this regard to the submission of Maluwa n 63 above at 38 that 'in an era in which post-independent Africa had witnessed the horrors of genocide and ethnic cleansing on its own soil and against its own kind, it would have been absolutely amiss for the Constitutive Act to remain silent on the question of the right to intervene in respect of grave circumstances such as genocide, war crimes and crimes against humanity'.

138 Since the AU has a *right* to intervene, a decision to that effect can only be avoided by a collective decision not to intervene in terms of art 7(1) of the Constitutive Act which determines that '[t]he Assembly shall take its decisions by consensus or failing which, by a two-thirds majority of the Member States of the Union'. See further Abass & Baderin n 51 above at 16.

139 *Id* at 15 points out that art 4(h) of the Constitutive Act does not have the same effect as its analogous provision in art 2(7) of the United Nations Charter. While art 2(7) is directed specifically at the UN and not at its members (who are restrained from interfering in the internal affairs of other states by the customary principle of non-intervention), art 4(h) restrains the AU as an institution from interfering in the internal affairs of its member states.

140 *Id* at 24 observes that the inclusion of these crimes, which either are *jus cogens* or obligations *erga omnes*, indicates that African states now 'recognize the inextricable link between an effective collective peace and security system and the observance of human rights of their people in their quest for peace and security on the continent'.

141 Article 4 of the Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st Extra-Ordinary Session of the Assembly of the AU, Addis Ababa

article 4(h) is intended to give the AU more flexibility to decide on intervention by including situations that threaten regional or national peace and security, thereby further limiting the opportunity of states to advance the objection of non-interference in their internal affairs.[142] The Peace and Security Council of the AU[143] thus now provides a clearly defined mechanism to determine situations in the African context constituting a serious threat to the legitimate order, and to take the necessary steps to restore peace and stability in the member states of the Union, in cooperation with the UNSC.[144]

In order to enable the Peace and Security Council to perform its responsibilities with regard to the deployment of peace support missions and interventions in terms of article 4 of the Constitutive Act, the Protocol Relating to the Peace and Security Council makes provision for the establishment of an African Standby Force.[145] The standby force, which has not yet fully materialised, will consist of five (sub-)regional standby brigades,

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(Ethiopia), 3 February 2003 (available at: http://www.au.int/en/treaties (last accessed August 2011)). Article 13 of the Protocol determines that the Protocol shall enter into force thirty days after the deposit of the instruments of ratification by a two-thirds majority of the member states.

142 Kioko n 136 above at 812; 817. The precise meaning of what constitutes a serious threat to the legitimate order and how it relates to the other grounds of intervention in art 4(h) – which are all international crimes in international law – are not clear. See further in this regard MP Ferreira-Snyman 'Intervention with specific reference to the relationship between the United Nations Security Council and the African Union' 2010 *CILSA* 156.

143 The Protocol on Amendments to the Constitutive Act of the African Union amends art 5 of the Constitutive Act by adding the Peace and Security Council to the principal organs of the AU. The Peace and Security Council was subsequently established by the Protocol Relating to the Establishment of the Peace and Security Council of the AU, adopted by the 1st Ordinary Session of the Assembly of the AU, held in Durban, South Africa, 9 July 2002 (available at http://www.au.int/en/treaties (last accessed August 2011)).

144 T Maluwa 'Fast-tracking African unity or making haste slowly? A note on the amendments to the Constitutive Act of the AU' 2004 *Netherlands International Law Review* 219. With regard to its relationship with the UNSC, art 17(1) of the Peace and Security Council Protocol provides that '[i]n fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also cooperate and work closely with other relevant UN Agencies in the promotion of peace, security and stability in Africa'. Article 17(3) furthermore determines that '[t]he Peace and Security Council and the Chairperson of the Commission shall maintain close and continued interaction with the United Nations Security Council, its African members, as well as the Secretary-General, including holding periodic meetings and regular consultations on questions of peace, security and stability in Africa'. If necessary, the AU will call upon the UN to provide financial, logistical and military support for the AU's activities in the promotion and maintenance of peace, security and stability on the African continent (art 17(2)).

145 Article 13(1) of the Protocol Relating to the Peace and Security Council of the African Union.

one in each of Africa's regions.[146] However, the lack of adequate financial resources to meet the peacekeeping demands in Africa remains the greatest hurdle in the way of the AU's peacekeeping function.[147]

The Assembly of the AU, as the supreme organ of the Union,[148] decides on intervention on the grounds provided for in article 4(h) of the Constitutive Act and the Protocol on Amendments to the Constitutive Act of the African Unity (once it comes into force).[149] The amended article 4(h) stipulates that the Peace and Security Council must recommend that the Assembly decide on intervention in the instance of 'a serious threat to legitimate order to restore peace and stability to the Member State of the Union'.[150] However, when the AU takes a decision to intervene in the internal affairs of member states in the interest of peace and security, this will be subject to the provisions of the UN Charter and general international law.[151] Article 53 of the UN Charter establishes a 'partially decentralized collective security system'[152] by providing that

> [t]he Security Council shall, when appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council …

It is thus the ultimate responsibility of the UNSC to determine a threat to or breach of the peace or an act of aggression in terms of article 39 of the

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146 See J Cilliers 'The African Standby Force: an update on progress' March 2008, Institute for Security Studies *ISS Paper* 160, 1–20. These regions are West Africa; Eastern Africa; Southern Africa; Central Africa and North Africa.

147 *Id* at 16.

148 Article 6(2) of the Constitutive Act of the African Union.

149 Article 4(h) of the Constitutive Act of the African Union provides for the right of the Union to intervene in a member state 'pursuant to a decision of the Assembly'.

150 See art 4(h) of the Protocol on Amendments to the Constitutive Act of the African Union.

151 Abass & Baderin n 51 above at 21. Article 52(1) of the United Nations Charter, dealing with regional arrangements, provides as follows:'1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.' Abass & Baderin *id* at 20–21 point out that, although there is no provision in the Constitutive Act of the African Union stating that the AU is a regional arrangement within the meaning of art 52 of the Charter, the presence of factors such as 'its composition (only African states), the bond between the members (common historical, cultural and political values) and the territorial scope of its operation, the African continent', raises a strong presumption of regionalism. Furthermore, because the predecessor of the AU, the OAU, has been treated by the UN and the international community as a regional arrangement within the scope of the United Nations Charter, the AU, established by the same member states that constituted the OAU, must likewise be accepted as such.

152 *Id* at 21.

Charter. Therefore, in the case of a regional conflict, the SC must first make a determination in terms of article 39 before authorising the regional organisation to act. Precedent, however, indicates that regional organisations tend not to wait for the SC to make such a determination.[153] These non-authorised interventions are usually justified by maintaining that it is not always expedient to wait for SC authorisation and that the Council has in some instances not fulfilled its obligations with regard to the maintenance of peace and security, often at the expense of Africa.[154]

It is clear that there is currently a conflict between the peace and security provisions of the UN Charter and that of the Constitutive Act of the African Union. It is submitted that this conflict be addressed by employing the principle of complementarity in instances where intervention is contemplated. This would entail that the primary responsibility for intervention be left to the regional organisation, in this case the AU, and that the UNSC should only intervene in instances where the regional organisation is unwilling or unable to undertake such action. If regional organisations are forced to obtain authorisation from the UNSC before they intervene in a state, the regional peace and security institutions would be subordinated to the SC procedures and the veto power, and consequently be rendered ineffective. For example, during previous crises in Zimbabwe, it was left to the AU and SADC to deal with the situation, and the attempt by the United States and Britain to involve the UNSC was vetoed by China and Russia who both argued that the particular crisis should be dealt with on a regional level.[155]

The role of regionalism in the restructuring of the UN

From the above exposition it is clear that three major role-playing institutions may be identified in the current world order: first, the nation state, secondly, regional organisations, and thirdly, international organisations. In order to restructure the UN, the underlying relationship between these institutions

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153 For example, the North Atlantic Treaty Organisation (NATO) intervened in Kosovo in 1999 without prior authorisation by the UNSC. The Economic Community of West African States (ECOWAS) had regularly in the past usurped the powers of the SC, for example, its organisation of peace-keeping forces for Sierra Leone and Liberia without initially consulting the UN. See further Kioko n 136 above at 821; Abass & Baderin id at 22.

154 Abass & Baderin n 51 above at 22–23; Kioko n 136 above observes that the absence of any complaint by the UNSC about its powers being usurped by regional organisations may be attributed to the fact that the interventions were in support of popular causes and that the UNSC had not taken action or was unlikely to do so at that time (at 821). According to Abass & Baderin id at 22–23 the absence of protest by the Security Council and members of the concerned regional organisation in the case of such a 'quasi-Article 39' determination, 'must be accepted as a development of new norms of state practice'.

155 Russia, China veto UN Zimbabwe sanctions, *Reuters* 11 July 2008 (available at: http://www.reuters.com/article/latestCrisis/idUSN11364578 (last accessed February 2012)).

needs to be clarified. Because issues that were previously exclusively entrusted to the applicable international institutions are also now within the mandate of related regional and even sub-regional institutions, a re-evaluation of current international structures is required in order to clarify the relationship between international, regional and, where necessary, sub-regional institutions, as well as to accommodate the growing importance of regional organisations and the consequent diminishing role of the nation state.

With regard to the nation state, it is submitted by some that the state will soon become obsolete. It is argued that if nation states are prepared to relinquish substantial elements of their sovereignty to regional institutions, it might eventually lead to their demise. A case in point is the proposed establishment of a United States of Africa. In contrast, the EU is not regarded as a sort of super-state. Another, it is submitted more correct view, is that because states simply cannot address global and regional challenges independently, they respond by pooling their sovereignty in regional organisations. The exercise of sovereignty today thus in fact requires participation in both international and regional organisations. As a result, individual states will not disappear, but will become semi-independent components of a larger political community.

Since the new wave of regionalism is a fairly recent phenomenon, regional alignments differ with regard to their form and level of development. Should regionalism be promoted and regional organisations properly developed with regard to their structures and functions, these institutions can play a fundamental role in the restructuring of the UN. Particular problems associated with regionalism in Africa, should, however, first be addressed. These include that clarity be achieved regarding the extent to which states will have to relinquish aspects of their sovereignty to the regional institution, arrangements containing subsidiarity, the creation of a regional criminal court, the responsibility and powers regarding the regional maintenance of peace and security, and the coordination and harmonisation of the individual initiatives of sub-regional organisations.

The structures of the UN are in many respects outdated. When one considers that the UN was established more than sixty-five years ago, and under very specific circumstances, it becomes apparent that in order to keep up with modern developments and circumstances, the restructuring of this institution is long overdue. The GA is a rather ungainly body consisting of a large number of states with extremely diverse interests. This complicates decision making and it is therefore understandable that the GA may only make recommendations. The body that may take binding decisions, namely the SC, consists of ten non-permanent members and five permanent members endowed with the veto power. The composition and decision-making process

of the SC show a clear democratic deficit as these few states dictate what happens on the international level.

In spite of certain problems associated with regionalism, its advantages cannot be denied. The existence of some or other common denominator is an inherent characteristic of all regional organisations. For example, although states on the African continent differ with regard to cultural, religious and language issues, the common denominator binding them is the notion of Pan-Africanism. Experience has shown that decision-making on controversial issues is enhanced when only a limited number of states (fifty-four in the case of the AU) bound together by a common interest are involved, as opposed to a large number of states (193 in the case of the UN) with divergent interests.

In employing regionalism within the restructuring of the UN, one's point of departure should be that the disadvantages of regionalism can to a large extent be mitigated by retaining an international institution, while at the same time revisiting its composition. In this sense, both regionalism and universalism have an important role to play in the current world order, and the one cannot do without the other. In view of the growing importance of regional organisations, it is suggested that serious consideration be given to eventually restructuring the UN as an international organisation consisting of 'sovereign' regional organisations. States invested with the basic aspects of sovereignty will then enjoy representation on the regional level only, as it is at this level where their interests can best be served. One may expect that on the international level, issues of international concern will be more effectively and expediently decided upon by only a limited number of regional organisations.

For example, the solution for the humanitarian crises on the African continent should first and foremost be found in the structures of the AU. It has often been stressed by the Union that African problems, such as the current conflict in Libya, should be solved by African solutions. International interventions insisted on by Western powers are often perceived as an attack on sovereignty and a form of neo-colonialism. In order to enhance the protection and promotion of human rights and the consequent development of a supra-national judicial system as in the EU, access to the AU's judicial organs should be as wide as possible. As part of the restructuring of the UN, considerations should also be given to the possibility of transforming international courts into courts of appeal with jurisdiction to hear appeals from regional courts.

Conclusion

The final conclusion that may be drawn from the above exposition is that an international discourse on the role of regionalism in the restructuring of the

UN should take place. In this discussion aspects that need clarification include issues such as the limitation of sovereignty and the future of the nation state as the locus of sovereignty, the composition and functions of regional organisations, the requirements regional organisations must fulfill in order to qualify for representation in the proposed international institution, and the functions and authority of the proposed international body.

The international community should actively work towards strengthening the effective functioning of regional organisations. In particular, if African leaders display the (united) political will to utilise regionalism to its fullest extent, it may contribute to the development of an international regime that will truly benefit the international community as a whole.