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African Union's Right of Intervention

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Abstract:

The purpose of this article is to analyze the foundations for the right of intervention of the African Union and to criticize its ineffective implementation since the entry into force of the Constitutive Act of the African Union on May 26th, 2001, instead and in place of the Organization of African Unity. Faced with the inability of African states to fight insecurity in their respective countries of the African continent, to assume their responsibility to protect their citizens as required by sovereignty; the African Union intends to respond to these challenges of security and protection of fundamental human rights on the continent with the implementation of its right of intervention. The African Union has adopted this interventionist mechanism to protect civilians and restore peace and security on the continent in accordance with Article 4 (h) of the Constitutive Act of the regional organization. This article highlights the legal and political capacity of the Union to realize the idea of African solutions to African problems, to impose peace and security with full respect for the fundamental rights of the individual through the strict application of the law, regional intervention.

Key words: African Union, The right of intervention, international law, security, States.

INTRODUCTION

As part of the search for African solutions to African problems, the pan-African organization, which is committed to the principle of the sovereignty of States in their international relations, has embarked on an action that runs counter to the traditional rule of this sovereignty of States in the African regional order. It is the consecration of a right of intervention of the African Union in its member states to restore peace and security in the continent, or even protect the fundamental rights of the people.

The African Union is an international organization[1] created by the Constitutive Act signed in Lomé on July 11, 2000, and entered into force in Syrte on May 26, 2001. It succeeded the Organization of African Unity (OAU) on July 9, 2002, in Durban. It becomes the pan-African organization par excellence which gathers almost all the African States.

As a regional organization[2], the African Union falls within the scope of Article 52 of the United Nations Charter, which recognizes regionalism, particularly in the maintenance of peace and international security. Its vision is to build a strong and united Africa, aiming at the economic and political integration of its members by the blossoming of its objectives now pretentious. In this perspective of the realization of the political and organizational destiny of Africa for which it is in charge, the organization of the African Union has aroused a renewed interest in international law, by making of its constitutive act, the first instrument to expressly devote the right of intervention[3].

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[1] The international organization can be defined as an "association of States constituted by treaty, with a common constitution and organs having a legal personality distinct from that of the member states", definition proposed during the work of codification of the law of the treaties, Sir Gérald FITZMAURICE, directory of International Law Comity (ILC), 1956-II, p.106.

[2] The International Organization is regional when it groups a small number of States on the basis of a geographical criterion or a community of interests. SALMON Jean, Dictionnaire du Droit International Public , Bruxelles, Bruylant, 2001, p.793.

[3] KIOKO Ben, « The Right of Intervention under the African Union's Constitutive Act : From non-interference to non-intervention », RICR, 2003, vol.85, n°852, pp.807-825.

The right of intervention of the African Union is enshrined in Article 4 paragraph (h) of its constituent act, which guarantees "*The right of the Union to intervene in a Member State by the decision of the Conference, in certain serious circumstances, namely war crimes, genocide and crimes against humanity* ". According to the doctrine, the right of intervention of the Union must be understood as a collective interference in the affairs of a Member State to prevent the aforementioned crimes. It is a concrete military operation of the Union in its member states for humanitarian purposes to provide relief to populations victims of massive violations of their fundamental rights. In clear terms, this right of intervention of the African Union refers to the judicial faculty that the organization has given itself in its constitutive act, to undertake armed coercive actions in the territory of its member states to protect the population against violence commission of some atrocities. This right falls within the general framework of the right of intervention, which is defined as the faculty of a State or an international organization, to interfere in the domain of reserved powers of a State to help it to regulate its own affairs, or to settle them in its place, or to oblige it to regulate them in accordance with the wishes by the use or the threat of the use of force if necessary[4]. Admittedly, it is a derogation from the principle of non-use of force in international relations. Then, this intervention will consist of measures of political, economic or military constraints against the State concerned. For this purpose, the right to intervene is based on the theory that the failure of the state to respect the laws of humanity establishes any third interference to protect the victims. It calls for non-indifference to human suffering, universal respect for the dignity and worth of the human person, and the laws of humanity of which the international community is the guarantor.

However, the consecration of this right of intervention in the normative arsenal of the African Union cannot fail to

[4] *DAILLIER PATRICK, FORTEAU Mathias and PELLET Alain, «Droit International Public », Paris, LGDJ, 2009, 8 edition, P.1046.*

surprise, given the traditional ideology of the Pan-African organization. It will be remembered that after the accession of the African States to independence, they acquired the most famous African regional institutions of the time by creating the Organization of African Unity on May 25, 1963. But, faced with its mixed record and its inability to adapt to changes in international society, the imperative of institutional renewal has become imperative. The African Union then appeared as a response to the security constraints of the continent. The dedication of the right of intervention by the African Union marks the radical break with the Organization of African Unity and its attachment to the sovereignty of its member states.

In reality, the right of intervention of the African Union is doubly necessary. On the one hand, it responds to the need for the African Union of the powerlessness suffered by the Organization of African Unity which has failed to contain many political and humanitarian crises that the continent has experienced in the principle of non-interference in the internal affairs of States and on the other hand, it responds to the need for the African Union to make up for the helplessness or failure of States that have failed to assume the responsibility to protect their population that sovereignty implies.

Talking about the right to intervene may lead to reflection on its historicity, its innovative character in the African legal environment, its effectiveness, its usefulness and its purpose. It seems necessary to develop reflections on the problem of the effectiveness of the norm in African international law. Despite its formal consecration in the normative arsenal of the African Union, it is noted that the right to intervene remains one of the least used instruments of the pan-African organization. This apparent slumber in the application of the norm raises questions from the African Union. Is the ineffectiveness of the right of intervention due to the foundations of the norm? What explains the difficult implementation of this standard?

The problem raised by this right of intervention of the African Union is complex, given the nature of the organization and the sensitivity of this right to sovereign States. The study is, therefore, attracting interest on two levels. On the theoretical level, it will make it possible to decipher the international action of the African Union within the Member States and to criticize its dynamics. In practice, it will measure the effectiveness of this right of intervention to understand the drowsiness and propose solutions. In a continent marked by the upsurge of political and humanitarian crises, the importance and timeliness of this subject are not to be demonstrated. This news of the crises in Africa renews the interest of the study of this right of intervention of the African Union which it is important to master the various parameters, precisely those relating to its foundations and its implementation.

1. Foundations

The questions raised by the right of intervention of the African Union require a thorough analysis of the foundations on which it is based. This is to demonstrate that the consecration of the right of intervention of the AU is based on two types of solid foundations. There is, in fact, upstream, political foundations and downstream, legal foundations.

1.1. The political foundations

The political foundations of the AU right of intervention refer to the legitimacy of this right. The recognition it enjoys in the African international society in pursuit of collective goals[5]. This is how we realize that the legitimacy of the AU right to intervene results on the one hand from the need for collective security and on the other hand from the responsibility to protect.

The need for collective security is the first foundation for the consecration of the right of intervention of the AU.

[5] *SALOMON Jean, « Dictionary du Droit International Public », Bruxelles, Bruylant P.643.*

Essentially political, it reflects the idea of indivisibility and solidarity of peace between states, all concerned by the security problems of each[6]. Concretely, it is a question of setting up a common system of prevention and defense against any form of aggression of a member of the community. In Africa, the need for collective security is based on a twofold observation. That of chronic instability in the historical evolution of the continent and that of a need for lasting stability.

Since the struggles for independence in 1960, Africa has always been home to many conflicts leading[7] to serious humanitarian crises on the continent. The main causes of this instability are essentially political. Despite the advent of democracy and its revival in the 1990s, the conquest of power in Africa is often confrontational in many states resulting in recurrent and dramatic armed violence. Despite the existence of a legal environment conducive to democracy, coups and other unconstitutional changes in government have emerged as undemocratic modes of African rule, unlike the disputed elections. This kind of usurpation of power challenges the legitimacy of the rulers, generates many crises, the source of insecurity and instability of the continent[8].

In addition, wars of national liberation and attempts at secession supported by the principle of self-determination of people, border disputes, ethnic violence, have also brought their disastrous contribution in terms of African humanitarian victims[9]. The multiplicity and severity of humanitarian crises on the continent testify to the helplessness of the international community to find a mechanism to anticipate or curb them. The persistence of these numerous conflicts is an obstacle to the

[6] COUSTON Mireilles, « Droit de la Sécurité Internationale», Brussels, Larcier, Paradigm Collection, 2016, p.23.
[7] FOGUE TEDOM Alain, « Enjeux Géostratégique et Conflit politique en Afrique Noire », Paris, Harmattan, 2008, PP. 7.
[8] GUEUYOU L. Mesmer, « Le Role de l'Union Africaine dans la Prévention et la Résolution des Conflits», in YUSUF Abdulqawi A. and OUGUERGOUZ Fatsah, l' Union Africaine, cadre juridique et institutionnel, Paris, Pédone, 2013, pp. 271-292.
[9] BARRY Mamadou Aliou, « Guerres et Trafics d'Armes en Afrique », Approche Stratégique, Paris, L'Harmattan, 2006, pp.49ss.

development of the continent. The need for sustainable stabilization is needed.

Being one of the poorest continents, imperative necessities of economic development are obvious. However, the search for development necessarily involves the search for peace, as emphasized in the preamble to the AU Constitutive Act. Peace must be understood in this context not only as the absence of conflicts but also as the meeting of conditions conducive to the economic, political and social development of States, in an environment of respect for democracy and fundamental rights. Sustainable stability on the African continent, therefore, requires a peace organization around a state security mechanism. Beyond state security, collective security has expanded to include human security[10]. Unable to conceive and practice oneself, it is within the framework of the AU that collective security becomes legitimate. Universal in the UN system with the security council as sole guarantor, collective security becomes regional under the auspices of the AU, in accordance with Chapter VIII of the UN Charter. It is therefore because of the need for stabilization of the continent that the AU Constitutive Act has enshrined the right of intervention[11]as an instrument of African collective security, within the framework of the external normative competence of the African Union.

A noble also comes to the right that the right of intervention also draws the responsibility to protect.

Secondly, the responsibility to protect consecrated in 2005 at the United Nation World Summit, is the second political foundation that legitimizes the use of force[12] by the

[10] DOUMBE-BILLe Stéphane, «La Régionalisation du Droit International », Brussels, Bruylant, 2012, p.25.

[11] SUR Serge, « Relations Internationales », Paris, Montchrestien, 2011, 6th Edition, P465;
See also KOLB Robert, « Article 53 », in COT Jean-Pierre and PELLET Alain and FORTEAU Mathias, La Charte des Nations Unies, Commentaire, Article par Article, Volume II, Paris, Economica, PP.1403-1437.

[12] DELCOURT Barbara, « L' introduction à la Notion de Responsabilité de Protéger dans les autorisations données par le Conseil de Sécurité: political issues and paradoxes », in BANNELIER Karine and PISON Cyrille, l'usage de la force autorisé par le Conseil de Sécurité, Paris, Pédone, 2014, pp.53-76.

African Union through the right of intervention. It is a concept that allows the international community to intervene on the territory of a State to put an end to the suffering of its population in case of bankruptcy by the State to its obligation to protect itself said population[13]. The responsibility to protect authorizes an international military humanitarian intervention on the territory of a State. It, therefore, supposes, on the one hand, an international intervention.

On one hand, the existence of a national crisis is one of the conditions for implementing the responsibility to protect. By virtue of the principle of State sovereignty, a crisis taking place within the territorial limits of a State falls within its exclusive competence. However, the doctrine recognizes that human rights as fundamental, natural, inalienable and indivisible rights are excluded from the scope of the principle of non-interference[14]. This is why an internal crisis, traditionally excluded from international competence by the principle of neutrality, may now be of interest to the international community in certain circumstances. It must be a situation of particularly serious violations of international human rights law and international humanitarian law. It is rather symptomatic that these types of very deadly internal conflicts are spread over the African continent. However, international human rights law imposes obligations on each sovereign state, including the obligation to protect[15]. Therefore, the bankruptcy of this obligation to protect or ensure security on its territory engages the responsibility of the State and constitutes a threat to peace and international security.

On another hand, international intervention on the territory of a state is a manifestation of the responsibility to protect. With the aim of protecting people against acts of

[13] *Report of the International Commission on Intervention and State Sovereignty (ICISS), Responsibility to Protect, International Development Research Center, Ottawa, December 2001,* http://www.icissi.ca/pdf/Rapport-de la Commission.pdf.

[14] *SUDRE Frédéric, « Droit européen et international des Droits de l'Homme.», Paris, PUF, 2012, p: 118.*

[15] *African Commission on Human and Peoples' Rights, Social and Economic Rights Action Center (SERAC) and Center for ECONOMIC and Social Rights (CESR) / Nigeria, 27 October 2001, paragraph 46.*

serious violence, the responsibility to protect enables the international community to act in the territory of the sovereign state. This intervention of the international community must be collectively organized within the framework of international, universal or regional organizations and not unilateral like the French intervention in Mali[16] on January 10th, 2013. Although the responsibility to protect does not necessarily imply the use of force, the most serious situations of human rights violations, once triggered, require military intervention to put an end to the intolerable suffering of the people. To save human lives, the responsibility to protect has thus been implemented a number of times by the universal organization in a gradual manner in some member states[17]. At the African regional level; it is within the framework of the African Union that the responsibility to protect is organized. Whether it is considered dangerous by some, the African Union's right to intervene is analyzed as a legal instrument for the implementation of the responsibility to protect, even without any explicit recognition of the concept. If for some, it does not yet come under positive law, although it may exist in other forms and denomination. For others, the responsibility to protect is a broad legal concept that must be able to find its place among international norms[18].

These reflections on the legal nature of the responsibility to protect establish us at the threshold of the legal and political foundations of the right of intervention of the African Union.

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[16] SOW Djiby, « La Légalité de l' Intervention Militaire française au Mali. Contribution à l'étude du cadre juridique de la lutte armée contre le terrorisme international », Paris, L'Harmattan, 2016, 287p.

[17] Resolutions S / RES / 1970 (2001) « Peace and security in Africa » of 26 February 2011 and S / RES / 1973 (2011) "The situation of the Libyan Arab Jamahiriya" of 27 March 2011 for the intervention in Libya;

See also LAMEK Alexis « La Responsibility de Protéger en Côte d'Ivoire, Libya and Syria: le point de vue du praticien », in CHAUMETTE Anne-Laure and THOUVENIN Jean Marc, la responsabilité to protéger, dix ans après, Paris, Pedone, 2013, pp.113-119.

[18] BOTHE Michael, "La Responsabilité to Protéger" en action ": le contenu de l'intervention", in CHAUMETTE Anne-Laure and THOUVENIN Jean-Marc, La responsabilité de protéger, dix ans après, Paris Pédone, pp.327-329

1.2. The legal foundations

It should be noted that African Union's right of intervention is firmly rooted in jus gentium, the human right. This is so because it justifies a broad consecration in regional international law whose conformity to general international law is undeniable.

Firstly, there is a clear commitment to regional international law. The right to intervene is rooted in African regional law. It is devoted to one part, in the constitutive act of the African Union and another part, in the additional protocols to the constituent act. As an international organization, the African Union is a subject derived from international law that exists only through the sovereign will of its members[19]. Its constituent instrument is, therefore, a multilateral treaty whose validity, like all treaties, is subject to the 1969 Vienna Convention on the Law of Treaties for its adoption and entry into force. The adoption of the constituent instrument, which marks the end of the negotiations, does not yet legally bind the States but allows them to definitively adopt the text which was drawn up at the end of the negotiations and to authenticate it by their signature or their initials. With regard to the Constitutive Act of the African Union, its development has seen milestones. In the absence of significant advances by the commission set up to amend the Charter of the Organization of African Unity (OAU), the idea of creating a new Pan-African organization to succeed the Organization of African Unity (OAU) was born under the impetus of former Libyan president Muammar Gaddafi[20]. The draft Constitution, prepared by the OAU General Secretariat and endorsed by legal experts, is, like all other treaties, a preamble standard defining principles, institutional and material clauses, and clauses of the organization.

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[19] TALL Saidou Nourou, « Droit des Organisations internationales Africaine. Théorie générale, Droit communautaire comparé, droit de l'homme, paix et Sécurité », Paris, L'Harmattan, 2015, P.57.

[20] BEDJAOUI Mohamed, «Bref survol historique des accomplissements vers l'Unité Africaine", in YUSUF Abdulqawi A. and OUGUERGOUZ Fatsah ,L' Union Africaine . Cadre juridique et institutionnel, Paris, Pédone, 2013, pp.21-33.

It is among the principles of the Constitutive Act that the right of intervention of the AU has been enshrined, precisely in its Article 4. Presidential Constituent Power from the AU, the Conference of Heads of State and The Government of the OAU unanimously adopted the draft presented to them at the Lomé Conference of July 11, 2001. The constitutive act thus adopted became binding only after its entry into force. This coming into force of the constitutive act provides for this formality; thirty (30) days after the deposit of the instruments of ratification of two-thirds of the members of the OAU. The AU Constitutive Act came into force on May 26, 2001, one month later. According to the terms of Article 33 (1) of the Constitutive Act, this entry into force automatically repealed the OAU Charter, which nevertheless operated transiently for one year until the actual succession of the AU to OAU on July 9 in Durban, South Africa[21]. This first consecration of the right of intervention of the AU was renewed in the later instruments of the pan-African organization.

Apart from the Constitutive Act, the right of intervention of the AU has essentially been enshrined in two important normative instruments, namely the Protocol on the Establishment of the Peace and Security Council of July 9, 2002, and the Protocol on Amendments to the Constitution of July 11, 2003. Regarding the first text, it enshrines the right of intervention of the AU and the body in several of its provisions. Thus, from the preamble, it entrusts the implementation of the right of intervention to the AU Security[22] and Peace and Security Council. Article 4 paragraph (J) of this Protocol reaffirms the entrenchment of this right among the principles of the AU and Article 6 paragraph (d) makes the intervention one of the main functions of the Peace and Security Council (PSC). For the fulfillment of this function, Article 7 paragraph

[21] BOURGI Albert, «L'Union Africaine entre les Textes et la Réalité », in AFRI, 2005, vol.VI, pp.326-344.

[22] ADJOVI Roland, « Le Conseil de paix et de Sécurité », in YUSUF Abdulqawi A. and OUGUERGOUZ Fatsah (ss.dir) L' Union Africaine : Cadre Juridique et Institutionnel", Paris, Pédone, 2013, pp. 133-146.

(e) gives the PSC the authority to recommend the right of intervention to the AU conference if the conditions of Article 4 paragraph (h) of the Act constituent are fulfilled. As for Article 7 paragraph (f), it allows the PSC to approve the modalities for implementing AU's right of intervention. For the operationalization of the AU right of intervention, Article 13 (1) of the Protocol establishes a prepositioned African military force composed of multidisciplinary quotas that Article 13 (2) obliges the Member States to maintain ready to deploy as soon as the intervention is necessary. As for the protocol of July 11 on amendments to the AU Constitutive Act that has not yet entered into force, it has reinforced the possibilities for the AU to trigger the exercise of the right of intervention. Indeed, the amendment of Article 4 paragraph (h) of the AU Constitutive Act by this protocol has broadened the scope of the AU right of intervention. Henceforth, in addition to the three situations originally provided for by the founding text of the AU, the right of intervention may be exercised in the event of any situation that could be described as a serious threat to the legitimate order of a Member State, to restore the authority of that state[23]. The AU's right to intervene is thus the subject of abundant recognition in these three main African regional instruments.

The right of interference in international law, its conformity with general international law, must be examined.

Secondly, there is also a clear conformity with the general international law. It is imperative that the AU's right to intervene be consistent with the international normative framework in general, particularly in view of the normative and institutional relations of the United Nations and the AU. Indeed, like all subjects of international law, the African Union is subject to the fundamental principles of general international law[24]. It is then necessary to examine on one hand the conformity of the right of intervention with the customary

[23] DIALLO Aminata, « Le droit d'intervention de l'Union africaine au motif de "graves menaces à l'ordre légitime": Etat des lieux et perspectives de mise en œuvre ", revue juridique et politique des Etats francophones, numéro spécial du droit de, pp.154-181.
[24] David Eric, «Droit des Organisations internationales », Brussels, Bruylant, 2016, P. 18.

international law. With regard to the conventional international law, it is essentially a question of examining the legality of the AU Constitutive Act which enshrines the right of intervention, in the light of the United Nations Charter, particularly in its Chapter VIII on regional agreements. Chapter VIII of the Charter composed of Articles 52, 53 and 54 sets the general framework for relations between the United Nations and regional organizations[25]. The question of the legality of the Constitutive Act of the AU is thus regulated by the first paragraph of Article 52 of the Charter. The latter sets two cumulative conditions for the recognition of regional agreements and organizations. The first condition is that the organization must carry out activities in the field of peacekeeping and international security. We could, therefore, argue prima facie that on this first point, the Constitutive Act of the AU is not inconsistent with the treaty provision. Indeed, it is a regional agreement that pursues objectives such as the maintenance of peace and hemispheric security. The second condition of recognition is compatible with the purposes and principles of universal organization. This condition establishes a hierarchy between the universal organization and the regional organizations with United Nations prominence. This superiority of the United Nations is, moreover, confirmed by Article 103 of the Charter on all the other agreements of Member States. Article 3 paragraph (e) of the AU Constitutive Act lists among the objectives of the organization, international cooperation with due regard to the United Nations Charter. Thus, the reading of Article 4 paragraph (h) enshrines the right to intervene to protect the fundamental rights of the population, making it possible to argue that this condition seems fulfilled because the protection of human rights is part of the aims of the United Nations[26]. And then, the AU's right of

[25] TEHINDRAZANARIVELO Djacoba Liva, « Les Relations entre l' Union Africaine et les Nations Unies en matière de maintien de la paix et de la sécurité », in YUSUF Abdulqawi A. and OUGUERGOUZ Fatsah, l'Union Africaine : Cadre Juridique et Institutionnel, Paris, Pédone, 2013, pp.327-359.

[26] HERREN Pascal, « L'Intervention Internationale au nom des Droits de l'homme. L'autorité de l'approche finaliste», Paris, LGDJ, Geneva, Schultess, 2016, p.43;

intervention falls within the framework of the maintenance of peace and international security. Chapter VIII of the United Nations Charter establishes regional bodies to undertake actions under the authority of the Security Council.

In international law, the validity of a treaty is subject to the lawfulness of its objective and purpose. The question of the legality of the AU's right to intervene with regard to certain customary principles of international law arises with foresight. This concerns the prohibition of the use of force in international relations and the prohibition of interference in the internal affairs of States. The prohibition of the use of force in international relations is a customary and conventional principle[27]through its codification of Article 2 (4) of the United Nations Charter. Above all, it has been erected as a standard of jus cogens. Therefore, any treaty that contradicts such a standard is void, in accordance with Article 53 of the Vienna Convention. The use of force is thus unlawful and can only be authorized in the case of serious violations of international law in certain circumstances expressly provided for in the Charter. Thus, Article 51 of the Charter authorizes an individual or collective self-defense and Article 42 entrusts the monopoly of the use of force to the United Nations Security Council under Chapter VII. In principle, legal in international law, the right of intervention of the AU must necessarily fall within these two major exceptions to be compatible with international law. It could possibly constitute a collective self-defense in the event that the serious circumstances which condition its triggering result from the armed aggression[28] of a Member State. It can also be analyzed as a use of force authorized by the Security Council under Article 53 al (1). The absence in the constituent act of reference to Chapter VIII or the mention of any authorization by the Security Council leaves the door open to a

See also Rougier Antoine, « La Théorie de l' Intervention d'Humanity », Paris, Dalloz, Tiret Collection à part, 2014, pp.23.

[27] DAILLIER Patrick, FORTEAU Mathias et PELLET Alain, « Droit International Public », Paris, LGDJ, 2009, 8th Edition, P.1035.

[28] KAMTO Maurice, « L'Aggression en Droit International», Paris, Pédone, 2010, p464.

divergent interpretation. It must be emphasized, however, that the Security Council can never protest against the use (Comoros 2008) or the threat of use (Burundi 2016) of the right of intervention by the AU. On the other hand, if we consider the AU as an organization aiming at the political integration of its states, the right of intervention could be analyzed as an instrument of maintenance of internal security and not a use of international force, incompatible with the customary and conventional obligations of the AU. Although still controversial, this right of armed intervention is increasingly receiving some recognition from the international community when it is used to put an end to serious violations of fundamental rights[29]. As to the prohibition of interference, as previously emphasized, as sovereignty is not absolute, it faces limits in the field of the protection of human rights. The conditions under which the right of intervention of the AU can be activated, allow concluding that it falls within the legal exceptions of this prohibition.

Although based on legitimate political needs and strong legal bases, AU's right to intervene is criticized in its implementation.

2. THE CRITICIZED IMPLEMENTATION OF AU RIGHT OF INTERVENTION

When the African security situation requires the exercise of the AU's right of intervention, implementation remains the sensitive and problematic point of this legal instrument. Thus critics around the mechanism of continental peace and security concern not only the conditionality of the implementation of the right of intervention but also the modalities of the implementation of the law.

[29] *HERREN Pascal, « L'Intervention Internationale au nom des Droits de l'homme. L'autorité de l'approche finaliste », Paris, LGDJ, Geneva, Schultess, 2016, pp.23ss.*

2.1. Criticism of the conditionality of implementation of the right of intervention of the AU

The conditionalities for the implementation of the right to intervene are the facts and preliminary acts to which the exercise of this right is subject. There are ambiguities about these prerequisites for the use of AU right of intervention. On one hand, there are unclear triggering facts and, on the other hand, necessary unspecified authorizations.

With regard to unclear triggering facts, these are serious circumstances in which the AU may exercise its right of intervention. These serious circumstances, as stated in the AU texts, are not, however, accompanied by definite elements. We must then refer to other conventional or doctrinal texts to explain these notions. It is a question of universal international crimes and of a regional international crime. With respect to universal international crimes, Article 4 paragraph (h) of the Constitutive Act provides that the AU may intervene in a member state in the case of a crime of genocide, a crime against humanity and a war crime. These are the most serious crimes that can be committed to international law. These crimes are so serious an attack on the fundamental values of the entire international community as universal jurisdiction. The International Criminal Court (ICC) was created on July 17, 1998, for their repression. Universal state jurisdiction also exists to prevent perpetrators of such crimes from escaping justice[30]. Although it is the subject of many critics, including African[31]; the repression of these crimes by the ICC can be seen as a judicial implementation of the responsibility to protect. The definition of these crimes should be sought in non-African international instruments referred to in Article 7 paragraph 1 of the Protocol of July 11, 2003, on the Peace and Security Council of the AU. The crime of genocide concerns one or more

[30] De LA PRADELLE Géraud, « La Compétence Universelle", in ASCENSIO Hervé, DECAUX Emmanuel and PELLET Alain, droit pénal international, Paris, Pédone, 2012,2th edition, pp.1007-1025.

[31] BRANCO Juan, « L'ordre et le Monde. Critique de la Cour pénal internationale », Paris, Fayard, 2016, pp.183.

acts listed in Article 6 of the Statute of the ICC as restrictive in its intent to deduce in whole or in part a national, ethnical, racial or religious group as such.

With regard to the crime against humanity, as defined in Article 7 of the Statute, it refers to an act or set of acts that attack human rights committed in the context of a systematic and widespread attack against a civilian population and with knowledge of this attack. These first two crimes constitute serious violations of human rights that can be committed at any time[32]. War crimes, on the other hand, are defined in Article 8 of the Rome Statute and amount to serious violations of international humanitarian law that can only be committed in the context of an armed conflict. It must be emphasized, however, that these definitions under general international criminal law correspond to the definitions contained in the African instruments of regional criminal law[33]. Committed to respect for the fundamental rights of the human person, the AU cannot remain indifferent when the population of its member states is the victim of such crimes. Therefore, the right of intervention can be perceived as a kind of curative treatment of the AU to free the population from these abuses. While the delineation of the AU's scope of international crimes seems easy thanks to the Rome Statute, regional crime is more complex to grasp.

As for regional crime, it does not appear to be so qualified in the Protocol on the amendments of the Constitutive Act of July 11, 2003. The latter is content, as mentioned above, to widen the scope of the right of intervention of the AU in case of serious threat to the legitimate order of a State in order to restore the peace and security of that State. The absence of conceptual clarifications of this expression raises many doctrinal controversies. However, if we agree with some writers

[32] JUROVICS Yann, « Article 7, le Crime l'Humanité », in FERNANDEZ Julian and PACREAU Xavier, Rome ,Statut de la Cour Pénale Internationale, Commentaire Article par Article, Paris, Pédone, 2012, pp.417-478.

[33] SOMA Abdoulaye, « Le Régionalisme Africain en Droit Pénale Internationale », RGDIP, 2016, N ° 3, pp.515-544.

that the phrase may be aimed at a constitutional change of government, the characterization of a regional crime can make sense. When we know that the AU has embarked on a process of regionalization of international criminal law; it is not surprising that the unconstitutional change of government is the subject of an unprecedented criminalization in African regional criminal law. This last reason for intervention is completely different from the first three, since it only seems to have a remote relationship with the protection of human rights, and serious violations of international law justify armed intervention. It undoubtedly reflects the AU's desire to be firmly committed to the promotion of the rule of law and democracy as a criterion of national and international stability[34]. The AU is no longer limited to condemning, rejecting and sanctioning unconstitutional changes of government. It can now intervene militarily to put an end to it in order to restore the authority of the State and to protect the population victim of the hostilities in the quest for the political power. This can take the form of a coup d'état or be multifaceted; the unconstitutional change that conditions the exercise of the right to intervene must affect the existence of a democratically elected government and not a dictatorial or illegitimate regime, that is to say, intervention must not give precedence to legal constitutional law on democratic legitimacy. In short, the intervention must respond to the deep aspirations of the people by avoiding privileging state sovereignty to the detriment of human security[35]. Admittedly, the determination of the degree of gravity of the threat and the appreciation of the legitimate order in a continent where the undemocratic processes of accession to power are legion, raise difficulties. The African Charter on Democracy and Good Governance is a relevant instrument for this purpose. Apart from these four situations provided for by the texts, the AU cannot exercise its right of

[34] MPLANA Joseph Kazadi, « L'Union Africaine face à la Gestion des Changements anticonstitutionnels de Gouvernement», RQDI, 2012, pp. 101-141.

[35] STURMAN Kathryn et BAIMU EVARIST, « Amendment to the African Union's Right to intervene : A shift from human security to regime security », African Security Studies, 2003, vol.12, n°2, pp37-45.

intervention, unless it is a requested intervention, as provided for in Article 4 paragraph (j) of the constitutive act.
In any case, authorizations are necessary for the exercise of AU's right of intervention, except that they are not specified.

As for unspecified authorization, the exercise of the AU's right of intervention is conditional on the respect of certain prerequisites that are not always the subject of an express precision in the texts of the AU. The use of the right to intervene requires both an internal authorization and an external authorization.

The internal authorization is that which emanates from an organ of the pan-African organization. In the presence of one of the triggering events provided for in the Constitutive Act, the exercise of the AU's right of intervention is subject to authorization by the AU Conference[36] of Heads of State and Government. As a primary, plenary and deliberative body, the Union Conference has full competence in the institutional architecture of the AU under Article 6 (2) of the Constitutive Act. Having the collective authority of the member states, this supreme political body has the power to authorize or not the use of force in inter-African relations in the event of a serious crisis. Indeed, Article 3 of its internal rules confers decision-making power for all AU interventions, whether under Article 4 (h) on AU right of intervention or Article 4 (j) of the AU constitutive act on the intervention requested by the Member States. The fact that this body brings together the plenipotentiaries of all the Member States certainly explains why such an important power has been entrusted to it. This omnipotence of the organ may seem at odds with the integrationist aspirations of the pan-African organization; even if it can be justified by the legitimate desire to involve in this process the highest political authorities of the Member States.

[36] *BISWARO Joram Mukama, « La Conférence, le Conseil Exécutif et la Commission », in YUSUF Abdulqawi A. and OUGUERGOUZ Fatsah, l'Union africaine, cadre juridique et institutionnel, Paris, Pédone, 2013, pp.79-91.*

With regard to the external authorization, it refers on one hand to that of the UN Security Council and, on the other hand, that of the Member State in whose territory the right of intervention must be exercised. Assuring the international police as the principal responsible for the maintenance of international peace and security, the UN Security Council has under its control regional bodies such as the AU in accordance with Chapter VIII of the Charter[37]. As a result, it has a right of scrutiny over any peacekeeping activity undertaken by these bodies, which must keep it regularly informed. As the holder of the monopoly on the use of force, any coercive action undertaken by regional bodies in the framework of peacekeeping requires its authorization in accordance with Article 53 (1) of the UN Charter. These organizations act as decentralized instruments of UN coercive action. This means that even if the intervention is decided by the Conference, it can only be effectively implemented with the prior authorization of the Security Council. The fact that certain military interventions were carried out without prior authorization can be explained by the urgency of the cumbersome and lengthy authorization procedure, even though they may have received subsequent approval[38] from the Council. This discretionary authorization authority of the Security Council is not expressly mentioned in the AU Constitutive Act but can be deduced from the normative and institutional subordination of the regional bodies provided for by the Charter. What might be perceived as a challenge to UN supremacy is fortunately filled by subsequent texts and practice of the continental organization. With regard to the consent of the Member State, the principle of sovereignty means that no armed intervention can take place on its territory without its consent. However, as previously noted, sovereignty meets limits. Even if the consent of the State on whose territory the

[37] SOMA Abdoulaye, «Les Relations entre l'Union Africaine et la Communauté Economique des Etats de l'Afrique de l'Ouest en matière de maintien de la paix », AYIL, 2010, pp. 345-388.
[38] Interventions of ECOWAS in Liberia in 1990 and in Sierra Leone in 1998.
See also SICILIANOS Linos Alexandre, « Entre Multilatéralisme et Unilatéralisme. L'autorisation par le Conseil de sécurité de recourir à la force », RCADI, vol.339, 2008, pp.189.

AU intervenes would give more legitimacy to this intervention, it is not theoretically necessary, which is not specified in AU law and can raise and make some difficulties. Subordinating AU's right of intervention to the prior consent of the member state would distort it and transform its existence into a conventional peacekeeping operation. It would even neutralize the scope, and purpose of the right. This is why the reluctance of the AU to intervene on the territory of Member States having formally expressed their refusal of such intervention despite the seriousness of the situation, as was the case for example in Burundi in 2015 and 2016, raises legitimate questions about the true will of the AU to break with the old habits of the OAU regarding non-interference[39]. These doubts are fueled by the revealing finding that its right to intervene without the consent of the Member State concerned.

Criticism of these conditions of the right to intervene awakens interest over that of the modalities of its implementation.

2.2. Criticism of the implementation modalities

It is important to look at how to implement the AU right of intervention, which has some imperfections that should be highlighted. This criticism focuses on both unfixed procedural modalities and unspecified operational modalities of the AU's right to intervene.

By non-fixed procedure modality, it is necessary here the different stages of the procedure which leads to the resolution of implementation of the right of intervention of the AU. These procedural modalities are not specifically set out in a document. It is then necessary to consolidate the relevant texts in order to retrace these modalities, which revolve around the referral and the decision-making process of the Conference. The referral to the AU Conference falls within the competence of a key body of the AU peace and security architecture. This is the Peace and

[39] *SIBOMANA Maureen, «Les défis d'un déploiement des forces de l'UA au Burundi", GRIP, 8 April 2006,* http://www.grip.org/fr/node/1984.

Security Council (PSC) that, the desire to end recurrent conflicts on the continent and promote peace, security and stability has led the AU to put in place[40]. Thus, this subsidiary body, created by the Durban Protocol of July 9, 2002, in the application of Article 5 (2) of the Constitutive Act, appears as a response to the fragility of the African security situation. Composed of fifteen elected and equal members, with a rotating presidency, it constitutes a system of collective security and early warning allowing a prompt and effective response to the situation of conflicts and crises in Africa. It is also a body for the prevention, management, and resolution of conflicts in Africa under Article 2 of the Protocol. Apart from its preventive mission of crises and conflict situations in Africa, it plays an important curative role. Thus, in the case of the commission of certain serious acts of violence, Article 7 of the Protocol gives it the power to recommend to the Conference the intervention in a Member State where the condition of Article 4 (h) is completed. The PSC is informed of these triggering facts either by the Chair of the AU Commission or through the information gathered through the continental rapid alert system[41] it has put in place. If the required quorum of two-thirds of the members is reached, the PSC, referring to the established criteria, for the implementation of the responsibility to protect or proceeding on a case-by-case basis, decides whether to recommend to the Conference, a military intervention. This decision is taken by consensus or failing that, by a two-thirds majority of its voting members, in accordance with Article 12 of the Protocol.

On this PSC recommendation, the Conference must make the final decision whether to allow the AU to exercise its right of intervention. This decision, a collective manifestation of the will of the AU, must be taken in accordance with Article 7 of the Constitution and 19 of its Rules of Procedure by

[40] LECOUTRE Delphine, « Le Conseil de paix et de Sécurité de l'Union Africaine, clef d'une nouvelle architecture de stabilité en Afrique ? », Contemporary Africa, 2004, No. 212, pp.131-162.

[41] NTWARI GUY-Fleury, « Le Cadre Juridique de Création et de Fonctionnement du Conseil de Paix et de Sécurité de l' AU: A Rétrospective sur la nature juridique du mécanisme central de l' APSA », in FAU-NOUGARET Matthieu and IBRIGA Luc Marius, L'architecture de paix et de sécurité en Afrique ? Bilan et perspective, L'Harmattan, 2014, PP.77-99.

consensus or failing that, by a two-thirds majority of the members of the Conference[42]. While the legitimacy of this plenary intergovernmental body justifies this decision-making power, its non-permanent character and its heavy decision-making process are out of step with the humanitarian emergency it must deal with. Indeed, this military resolution of the humanitarian crisis is subordinated to the political calendars of the member states of this omnipotent body. In the absence of a consensus or the required majority, the AU is not allowed to exercise its right of intervention, leaving the victims of these inhumane crimes to their plight unless the UN Security Council decides to use the AU to end it as Article 53 paragraph 1 of the Charter gives it the power. Moreover, it seems that the decision of the conference has a discretionary nature since there is no sanction mechanism in case of immobility of the AU. This aspect of collective security is open to criticism because the victims of international crimes have no means of action on the AU's decision, nor recourse for non-intervention. Human security in Africa would benefit from providing, like the European Union, a mechanism similar to the recourse for default in case of the inaction of the AU in the face of one of the triggering events. This possible remedy could be exercised by victims of injurious inaction at the African Court of Justice and Human Rights. The existence of such a remedy could incite the Member States involved in the decision-making process of the right of intervention to separate selfish political considerations in order to express a clear will of the organization by avoiding to commit what is considered as an "abuse of the legal personality"[43] of the AU. In addition, the right to intervene would be more effective if the initiative and decision fell within the purview of the permanent body, the PSC.

[42] TCHICAYA Blaise, «Le droit de l'Union Africaine. Principes, Institutions et Jurisprudence », Paris, Berger-Levrault, 2014, p.143.

[43] D'ASPERMONT Jean, « Abuse of the Legal Personality of International Organizations and the Responsibility of Members States », IOLR, 2007, n°1, pp.91-119.

When the right of intervention is authorized by the Conference and validated by the Security Council, it is up to the PSC to implement it through the operational modalities which remain indeterminate.

Regarding the operational modalities, they refer to the methods and means of implementing the right of intervention of the AU. This crucial question raises questions about the types of operation required for the exercise of the right of intervention, which is not always the subject of precise determination. The implementation of the right of intervention by the PSC requires human resources; financial and logistics. This is why the African Peace and Security Architecture provides, in support of the PSC as a guarantor of collective security, an African Standby Force (FAA)[44]; formed of five regional brigades composed of multidisciplinary contingents stationed in their state of origin and ready for rapid deployment. In addition, a special fund for peace, mainly funded by the member states, is planned to finance the operations of the PSC. Despite the support of some African states, the continent's overall economic situation justifies the glaring lack of military and logistic equipment, financial resources, which severely thwart the operationalization of the right of intervention, particularly by the African Standby Force. This operational deficiency explains the AU's financial dependence on the UN and Western partners. Thus, the limits of the AU's response capacity noted in Darfur and Somalia have been financially and logistically compensated by the UN. The EU remains, however, the main donor[45] of African operations, thanks to its peace support facility for Africa.

With regard to the operations for the implementation of the right of intervention, it may be, depending on the case, a

[44] KPODAR Adama «La Politique de Défense commune en Afrique » in FAU-NOUGARET Mathieu and IBICGA Luc Marius, L'architecture de paix et de sécurité en Afrique. Bilan et perspectives, Paris, L'Harmattan, 2014, pp.27-48.

[45] DARMUZEY Philippe « La Facilité de Soutien à la paix pour l'Afrique, moteur d'une nouvelle alliance Euro-Africaine pour la sécurité et le développement », in FAU-NOUGARET Mathieu and IBICGA Luc Marius, l'architecture de paix et de sécurité en Afrique, bilan et perspectives, Paris, L'Harmattan, 2014, pp.243-256.

peace-building or peace-enforcement operation in the member country of AU concerned, as it was in the case of Comoros in 2008. In either case, if comparative advantage leads to regional intervention, nothing prevents the AU from carrying out these curative operations in collaboration with the subregional and regional mechanisms most often with the UN. This last collaboration is sometimes necessary because of the lack of financial and logistical means already emphasized by the AU to carry out the intervention alone and cannot give carte blanche to the regional organizations. This UN support can be explained by the political support of regional bodies, but also by the necessary complementarity between the United Nations and regional bodies in the implementation of collective security.

Although the AU has already carried out several UN-authorized military operations, whether in Burundi (MIAB), in Sudan (AMIS and UNAMID)[46], Mali, in the Central African Republic or Somalia (AMISOM), one thing is clear. The analysis of its conditions of deployment of these different operations does not seem to answer the scenario of the right of intervention. These are in fact conventional peacekeeping operations, subject to the consent of the Member State in whose territory the operation is taking place.

CONCLUSION

According to this article, it is fair to say that the AU has never yet implemented the right of intervention as provided by Article 4 (paragraph h) of its Constitutive Act. This lack of application of the standard is due to several factors. Apart from the procedural and operational difficulties mentioned above, an unforeseen major obstacle always stands against the effectiveness of the right of intervention. Despite its formal commitment to a new model in coercive action, the incarnations

[46] *MUBIAL Mutoy, «Les Opérations de Maintien de la Paix de l'Union Africaine : étude des cas de Burundi et Sudan », in YUSUF Abdulqawi A. and OUGUERGOUZ Fatsah, L' Union Africaine: Cadre Juridique et Institutionnel, Paris, Pédone, 2013, pp.309-325.*

of respect for sovereignty, a cardinal principle for the AU; remain. This innate attachment to the sovereignty of its member states leads systematically to prioritize political interests over human security. This prevents effective implementation of the right of intervention and is in violation of the obligations imposed by the African Charter on Democracy, Elections, and Governance.

It must, therefore, be noted that, despite certain progress, the AU still lacks the capacity and especially the political will to ensure collective security on the continent. Nevertheless, the right of intervention of the AU can find an effective application with the reinforcement of the collective security which constitutes the African capacity for immediate response to crises, (CARIC) human rights and democracy a cardinal value in their mutual relations. Surprisingly, sovereignty, far from being a concept obsolete continues to explode on the African continent. So, will the African Union's right of intervention succeed its bet?

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