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Silencing the Guns: The Tigray Conflict, Right of Intervention, and the African Union's Dilemma

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In replacing the Organization of African Unity (OAU), the African Union (AU) officially became the embodiment of Africa's hopes and aspirations, especially with regard to key objectives of peace and security on the continent. To aid in the realization of this objective, the Constitutive Act grants the organization the right of intervention with respect to the internal affairs of member-states, mostly with regard to serious crimes amounting to war crimes, crimes against humanity, and genocide. The organization has demonstrated its desire to realize this objective through important initiatives such as the 'silencing the guns in Africa' initiative. Unfortunately, the seemingly endless violent conflicts on the continent could undermine this objective and derail efforts by the organization. The latest in the long list of conflicts is Ethiopia's war in its Tigray region, which has put the continent on the front row of global discourse. From a crisis that started as a domestic "rule of law action," events have moved quickly with the conflict portending dangerous signals for the entire Horn of Africa region. As calls for a ceasefire and de-escalation continue to ring from several quarters, the AU remains in the eye of the storm, especially with respect to its apparent ambivalence on the right of intervention under the Constitutive Act. This article offers a reflective analysis of the AU's right of intervention within the context of a number of issues, namely the lack of clarity on what the right of intervention means, the determination of a legal basis for intervention on the grounds enumerated in the Act, and the lack of political will on the part of the organization. The article notes that the key to ensuring a full resolution of the conflict lies in taking steps toward political negotiations, which holds both short and long-term prospects of significantly addressing

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the critical issues. It concludes that this move will require leaders on the continent to rise above the current limitations of the organization and find a way of bringing both sides to the discussion table.

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I. INTRODUCTION

Africa's ambition is to silence all guns on its territory. This is at the heart of its "Silencing the Guns in Africa by 2020" initiative, adopted in 2013 during the Organization of African Unity (OAU)/African Union (AU) Commemorative Anniversary Summit of African Heads of State.¹

1. The initiative has since gathered momentum starting with the open session of the AU (Peace and Security Council) PSC themed "Silencing the Guns: Prerequisites for Realizing a Conflict-free Africa by the year 2020" which was held at the AU Headquarters in Addis Ababa, Ethiopia on April 24, 2014. Towards operationalizing the vision, the AU also convened a high-level retreat on the theme "Silencing the Guns in Africa: Building a Roadmap to a Conflict-free Continent" which was held in Durban, South Africa between April 28 and 29, 2014. Again, between October 21 and 23, 2014, the AU in collaboration with the Government of Tanzania, and supported by the African Centre for Constructive Resolution of Disputes (ACCORD) and Institute for Security Studies (ISS), organized a high-level retreat on the theme "Silencing the Guns—Owning the Future," held in Arusha, Tanzania. Furthermore, in 2016, the AU-PSC developed a set of concrete objectives referred to as "AU Master Roadmap of Practical Steps to Silence the Guns by Year 2020" (AUMR) [hereinafter Lusaka Roadmap]. The AU Commission was expected to execute the AUMR, working in conjunction with Regional Economic Communities (RECs), the United Nations (UN), and Civil Society Organisations (CSOs). The goal was to guide member-states in realizing this objective. Formally launched in 2017, it aspires to end all wars, conflict, and

At the fourteenth Extraordinary Session of the Assembly, held on December 6, 2020, at Johannesburg, South Africa, the organization agreed to extend the project to 2030.² The ‘silencing the guns’ initiative is a part of aspiration 4 of the AU’s *Africa We Want Framework* (Agenda 2063),³ which is in tandem with its goal of guiding the continent’s development in the next fifty years.⁴ Challengingly, this noble objective has been hampered by the scourge of intra-state armed conflicts on the continent. One of such is Ethiopia’s conflict in its Tigray region [*Hereinafter* The Tigray Conflict], which is gradually moving towards its second-year anniversary.⁵ Many had thought that the conflict which developed out of domestic political squabbles between the central government in Addis Ababa and the regional government in Mekelle the Tigrayan capital, would be sorted out quickly and matters laid to rest.⁶ However, not only have the belligerents refused to sheath their swords, the conflict has generated perhaps the biggest humanitarian crisis on the

gender-based violence as well as to prevent genocide. The initiative arose out of the observation that the continent had become an arena of violent conflicts, which made economic and political integration difficult. Its strategic objectives include (a) address the structural root causes of conflicts on the continent; (b) eradicate recurrent and address emerging sources of conflicts; (c) maintain a nuclear-free Africa; (d) ensure effective implementation of agreements on landmines as well as the non-proliferation of small arms and light weapons; (e) address the plight of internally displaced persons, refugees and eliminate the root causes of this phenomenon. For an extensive overview, see generally Victor H. Mlambo, *Silencing the Guns in Africa Beyond 2020: Challenges from a Governance and Political Perspective*, 7 COG. SOC. SCI. 1, 3 (2021); Zipporah Musau, *Silencing the Guns in Africa by 2020*, AFR. RENEWAL (Dec. 23, 2019), <https://www.un.org/africarenewal/magazine/december-2019-march-2020/silencing-guns-africa-2020>; Julian Karssen, *Silencing the Guns in Africa: Achievements and Stumbling Blocks*, AFR. RENEWAL (Feb. 7, 2020), <https://www.africaportal.org/features/silencing-guns-africa-achievements-and-stumbling-blocks/>; Wafula Okumu et al., *Silencing the Guns in Africa: Achievements, Opportunities and Challenges*, INST. FOR SEC. STUD. 1, 4; *Silencing the Guns, Owning the Future: Realising a Conflict-free Africa*, ACCORD (2015), <https://www.peaceau.org/uploads/arusha-au-high-level-retreat-report-web.pdf>; Ramtane Lamamra, *Silencing the Guns Requires a Multi-pronged Approach*, AFR. CTR. FOR CONSTRUCTIVE RESOL. OF DISP. (Dec. 14, 2020), <https://www.accord.org.za/conflict-trends/silencing-the-guns-requires-a-multi-pronged-approach/>.

2. See United Nations Development Programme [UNDP], *Silencing the Guns—A Developmental Approach* (2021), <https://www.undp.org/sites/g/files/zskgke326/files/migration/africa/UNDP-Silencing-the-Guns-A-Development-Approach.pdf>.

3. This is 50-year plan of the African Union aimed at fostering sustainable and inclusive economic growth and development on the continent. It was unveiled at AU’s fifty (50) years anniversary in Addis Ababa, Ethiopia in 2013. See *Agenda 2063-SDGs*, Afr. Union [AU], <https://au.int/en/ea/statistics/a2063sdgs>.

4. See *id.*

5. See Andres Schipani & David Pilling, *Ethiopia: War in Tigray Threatens to end Abiy’s Dream of Unity*, FIN. TIMES (April 7, 2021), <https://www.ft.com/content/8f18a8bf-0999-43e6-9636-3581a8a2c249>.

6. *Id.*

continent.⁷ While the Prime Minister, Abiy Ahmed promised to swiftly restore law and order in Tigray, the conflict has since metamorphosed into a protracted war.⁸ Though, from an international perspective, the conflict comes within the United Nations (UN) mandate on global peace and security,⁹ from a regional standpoint, it also falls within the framework of the AU's right of intervention under Article 4 (h) of the Constitutive Act.¹⁰ Whereas it holds this right, oftentimes the organization prefers to resolve conflicts on the basis of the subsidiarity principle,¹¹ in which Regional Economic Communities (RECs) serve as building blocks.¹² With respect to security issues in the Horn of Africa where Ethiopia is located, the Intergovernmental Authority on Development (IGAD), a regional organization, also possesses legal norms and institutional arrangements, which gives it a mandate to address these issues.¹³ In the event that these

7. *Id.*

8. *Id.*

9. Art. 1 (1) of the UN Charter stipulates that signatories must take steps “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” See Nsongurua Ndombana, *When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan*, 27 HUM. RTS. Q. 1149, 1150 (2005).

10. In line with Article 4 (h) of the Constitutive Act, the AU has powers to intervene in member states in the case of crimes against humanity, war crimes and genocide. See generally African Union [AU], *Constitutive Act of the African Union*, art. 4(h) (May 26, 2001), https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf [hereinafter *Constitutive Act of the African Union*].

11. “Subsidiarity” is an European governance concept in which problem solving is prioritized at the levels closest to a given situation. In governance context, it means a multi-layered structure consisting of various levels of intervention. It means that the upper level e.g., the state should only perform task which cannot be performed at the lowest level e.g., by local actors. In Africa, it is essentially a political issue, marred by legal and practical challenges and a lack of clarity in the relations between continental and regional mechanisms. Leading to incoherence, competition and intrusions. There have been calls for a sustainable subsidiary framework which is defined operationally in a manner that it can respond the complexities of the African institutional context. See generally Felicite Djilo & Paul-Simon Handy, *Unscrambling Subsidiarity in the African Union – From Competition to Collaboration*, INST. FOR SEC. STUD. 1, 3 (2021) <https://issafrica.org/research/africa-report/unscrambling-subsidiarity-in-the-african-union-from-competition-to-collaboration>.

12. The AU/RECs Framework is governed majorly by the Abuja Treaty and the Constitutive Act. See *Regional Economic Communities (RECs)*, African Union [AU] 1, 1 <https://au.int/en/organs/recs>.

13. See generally Getachew Z. Gebrekidan & Messay A. Gobena, *Rethinking IGAD's Role in Addressing Emerging Regional Security Threats*, 4 SVNP SPECIAL PAPER SERIES 1, 1-8

dual framework fails, the AU is then constrained to step in and pursue resolution.

The Tigray conflict has put the organization in a rather dilemmatic situation, especially within the confines of its “silencing all guns in Africa by 2030” initiative and the broader Agenda 2063 goal. On the one hand it is daringly confronted by a mammoth humanitarian crisis which continues to grow by the day, while at the same time the possibility of exercising its right of intervention is seriously constrained, due to complex political impediments that have emerged from the fighting. Despite its recognition of the principle of non-indifference and the fact that Article 4 (h) of the Constitutive Act set parameters that ordinarily ought to trigger the exercise of its right of intervention, and notwithstanding that the mandate of the PSC is also crystal clear in this regard, the peculiarities of the Tigray conflict and the fact that for the first time, the organization is confronted with calls to intervene in a conflict involving its host, puts it in an extremely difficult position. This Article seeks to examine the AU’s dilemma with respect to its right of intervention, using the Tigray conflict as a case study. It highlights important challenges such as the lack of clarity on what the right of intervention actually means, the difficulty in establishing a legal basis for intervention, the intersection between the right of intervention and the sovereignty of member-states, and the problem of lack of political will on the part of the organization. The Article concludes by calling for a negotiated political solution to the conflict, stressing the leading role which must be played by leaders on the continent.

II. THE TIGRAY CONFLICT IN TIGRAY: AN OVERVIEW

Fighting in the Tigray conflict broke out in the late hours of November 3, 2020, when forces of the Tigray Patriotic Liberation Front (TPLF) in collaboration with Tigrayan federal military officers took over the Ethiopian military base in the region, killing and detaining some officers.¹⁴ It also took over the base and the arms lodged there, some of which are perhaps the bests in the country’s military arsenal.¹⁵ In response, the Abiy government deployed the Ethiopia National Defense Force (ENDF) backed by militiamen from the Amhara region, with

(2021), <https://www.scribd.com/document/534258535/Rethinking-IGAD-s-Role-in-Addressing-Emerging-Regional-Security-Threats.pdf>.

14. See *Finding a Path to Peace in in Ethiopia’s Tigray’s Region*, INT’L CRISIS GROUP 1, 3 (Feb. 11, 2021), <https://icg-prod.s3.amazonaws.com/b167-ethiopia-tigray-region.pdf>.

15. *Id.*

Eritrean military forces joining the conflict from the north of the country.¹⁶ In the course of this offensive, the Ethiopian government made key advances, capturing towns west of Tigray stretching from Dansha to Zalambessa, a border town with Eritrea.¹⁷ The Ethiopian Broadcasting Corporation (EBC), quoting the Commander of the Northern sector Major-General Belay Seyoum, said that at least 550 TPLF fighters were killed in the offensive while nineteen surrendered.¹⁸ He also said that some of the weapons that the TPLF looted from the northern command were either recaptured or destroyed, with five tanks captured and one destroyed.¹⁹ He also added that the Head of Communications for the ENDF, Major-General Gebremehdin Fekadu, was arrested alongside sixteen other officers, for disrupting communications in the northern command, which aided the TPLF's attack.²⁰ TPLF forces also launched strikes on military bases in Bahir Dar and Gondar in response to air strikes by the government.²¹ In addition, the TPLF sent rockets into neighboring Eritrea, accusing the government in Asmara of supporting the Abiy government.²² Regional leaders have accused the Eritrean government of attacking Tigray on the order of the government in Addis Ababa.²³

After two weeks of intense fighting, and following the conclusion of a three-day ultimatum to the TPLF forces to surrender,²⁴ the Ethiopian government announced that its troops were marching on the Tigrayan capital Mekelle.²⁵ In a bid to cow the rebel region, the central government also adopted a form of economic warfare alongside its military operations, an example being the freezing of bank accounts of thirty-four subsidiaries

16. *Id.*

17. See Addis Getachew, *Ethiopia: 550 Rebels Dead as Tigray Offensive Continues*, ANADOLU AGENCY (Nov. 11, 2020), <https://www.aa.com.tr/en/africa/ethiopia-550-rebels-dead-as-tigray-offensive-continues/2039855>.

18. *Id.*

19. *Id.*

20. *Id.*

21. See Reuters, *Two Missiles Target Ethiopians Airports as Tigray Conflict Widens*, CNN (Nov. 14, 2020, 9:51 AM), <https://www.cnn.com/2020/11/14/africa/ethiopia-airport-tigray-intl/index.html>.

22. See Giulia Paravicini, *Ethiopia Says its Troops Marching on Tigrayan Capital*, REUTERS (Nov. 17, 2020, 3:04 PM), <https://www.reuters.com/article/ethiopia-conflict-int-idUSKBN27X2VG>.

23. See Colin Drury & Vincent Wood, *Ethiopia Tigray Crisis: Explosion Rock Major Cities Amid Growing Fears of Wider Civil War*, INDEPENDENT (Nov. 14, 2020), <https://www.independent.co.uk/news/world/africa/ethiopia-tigray-crisis-civil-war-update-b1722933.html>.

24. See Colin Drury & Vincent Woods, *Ethiopia Tigray Crisis: Abiy Issues "Ultimatum" as Civilians Flee Fighting*, BBC NEWS (Nov. 18, 2020, 11:31 PM), <https://www.bbc.com/news/world-africa-54960150>.

25. See Paravicini, *supra* note 22.

of the body known as “Endowment Fund For the Rehabilitation of Tigray (EFFORT),” a fund administered by the TPLF.²⁶ The region was supposed to receive 10.4 billion Birr (\$272 million), but in October 2020 the central government froze payment of subsidies to the Tigray government, saying it would instead henceforth allocate funds to the local authorities.²⁷

In June 2021, an airstrike launched by government forces hit a busy marketplace in the small town of Togoga, just west of Mekelle the Tigrayan Capital, killing about thirty people.²⁸ The attack, one of the several horrors of the conflict, was widely condemned across the globe. Reacting to the event, the US (US) Department of State said it was “gravely concerned,” while the European Union (EU) described it as “extremely worrying.”²⁹ Also decriing the attack, the European External Service Action in a statement said, “*this is yet another attack adding up to the horrific series of International Humanitarian Law and human rights violations, atrocities, ethnic violence, combined with serious allegations of use of starvation and sexual violence as weapons of conflict.*”³⁰ The attack clearly summed up the dangerous phase the conflict had attained. Following a short period of respite, hostilities again resumed in October 2021 with government forces launching coordinated attacks against TPLF forces.³¹ While the TPLF forces accused the government of using artillery, tanks, jets, and drones in an attempt to invade the region again, the government on its part said it has a responsibility to protect its citizens across the country from terrorism and was simply acting in that regard.³² For a period of time, the conflict appeared frozen, with much of the earlier part of 2022 seeing a sharp drop in media reportage, especially as media attention shifted to the Russia-Ukraine war, however, in recent times, and following the collapse of the ceasefire agreements, fresh

26. See Samuel Gebre & Simon Marks, *Ethiopia Tightens Economic Clampdown on Rebel Tigray Region*, BLOOMBERG (Nov. 18, 2020, 12:30 AM), <https://www.bloomberg.com/news/articles/2020-11-18/ethiopia-freezes-assets-of-fund-accused-of-backing-war-in-tigray?leadSource=uverify%20wall>.

27. *Id.*

28. See Bethlehem Feleke & Eliza Mackintosh, *Condemnation Build over Deadly Government Airstrike in Tigray*, CNN (June 24, 2021, 9:26 AM), <https://www.cnn.com/2021/06/24/africa/ethiopia-tigray-military-airstrike-intl/index.html>.

29. *Id.*

30. *Id.*

31. See *Ethiopia's Tigray Crisis: Army Launches Offensive on all fronts—Rebel*, BBC NEWS (Oct. 11, 2021), <https://www.bbc.com/news/world-africa-58869970>.

32. See *id.*

offensive began in August, on the southern borders of Tigray region, which adjoins Amhara state.³³

At this point the situation has become dire, demanding urgent intervention by non-Ethiopians. To start with, there is an urgent need to de-escalate the conflict, separate warring parties, and move towards restoring peace to the region. While global powers do have some role to play, such as the United States (US) which gives aid of more than \$1 Billion to the Ethiopian government,³⁴ this will most likely not achieve much, given how bad the situation has become. In addition, the intervention of Western nations may likely complicate the conflict, due to the likelihood of the introduction of geopolitical considerations. Against this backdrop, it appears clear the solution to the crisis points in one direction—the need to look inward and seek a solution from within. In this respect, there isn't a better place than the AU, which has both a legal and moral mandate to intervene, pursuant to its right of intervention.³⁵ This however throws up troubling concerns such as under what conditions can any intervention be mounted and the peculiar realities the organization has to contend with. The next section of this article examines these issues as it relates to the right of intervention of the AU.

III. AFRICAN UNION AND THE RIGHT OF INTERVENTION

In this section, effort is made to discuss the normative framework for addressing conflicts on the African continent, particularly within the context of the Constitutive Act of the AU.

A. *Background to the Creation of the African Union*

For decades, the burden of “realizing” Africa as a force to be reckoned with in the community of nations, rested on the shoulders of the Organization of African Unity (OAU), an organization established on May 25, 1963, following a series of multinational African conferences held between the 1950s and 1960s.³⁶ At the core of the OAU Charter was the immediate goal of liberating African states from the shackles of

33. See Alex de Waal, *Ethiopia Civil War: Why Fighting Has Resumed in Tigray and Amhara*, BBC NEWS (Sept. 1, 2022), <https://www.bbc.com/news/world-africa-62717070>.

34. See Max Bearak & John Hudson, *Samantha Power has Long Championed Humanitarian Intervention: Ethiopia's Conflict is Putting Her to the Test*, WASH. POST (Aug. 5, 2021, 1:59 PM), <https://www.washingtonpost.com/world/2021/08/05/samantha-power-tigray-sudan/>.

35. See *Constitutive Act of the African Union*, *supra* note 10, at art. 4(h).

36. See Makaria Green, *Rights-Based Approaches to Development: The African Union*, 6 HUM. RTS. & HUM. WELFARE 4, 4 (2006).

colonial rule.³⁷ The organization achieved steady progress, such that by the 1970s, a sizeable number of states had attained independence, with the exceptions being South Africa and Zimbabwe.³⁸ It also contributed to ending the reign of the then racist apartheid government in South Africa.³⁹ While the main aim for establishing the organization, i.e., the eradication of colonialism and securing independence for African states had been achieved, the huge difference between the challenges of the 1980s/1990s against those of the 1960s, meant that the organization began to be in need of reform.⁴⁰ To address this problem, a Charter Review Committee was set up to explore relevant issues as well as possible reforms that could be undertaken to make the organization more effective.⁴¹

A key area of concern was the Charter's stipulation of non-interference in the internal affairs of member states, which made it difficult for the organization to act decisively at the most critical time,⁴² weakening its ability to prevent and manage conflicts on the continent including civil wars.⁴³ This clear error watered and amplified gross impunity and lawlessness, resulting in unimaginable bloodletting and egregious inhumanity on the continent. Examples include large-scale atrocities which swept across conflict zones such as Angola, Congo, Liberia, Libya, Sierra Leone, Uganda, and Rwanda.⁴⁴ Challengingly, the Committee was also plagued by familiar problems, for instance, a lack of cooperation as well as ambivalence by member states, such that it couldn't deliver on its mandate. Following this, the Assembly of Heads of State and Government met in Sirte, Libya between 8 and 9 September 1999, and agreed on the formation of the AU,⁴⁵ which formally came into

37. *Id.*; See generally Keith Gottschalk, *The African Union and Its Sub-Regional Structures*, 1 J. AFR. UNION STUD. 3, 13 (2012).

38. See Yayew Genet Chekol, *African Union Institutional Reforms: Rationale, Challenges and Prospects*, 12 INSIGHT ON AFR. 29, 30 (2020).

39. See Stacy-Ann Elvy, *Theories of State Compliance with International Law: Assessing the African Union's Ability to Ensure State Compliance with the African Charter and Constitutive Act*, 41 GA. J. INT'L L. 77, 84 (2012).

40. See Corinne A. A. Packer & Donald Rukare, *The New African Union and its Constitutive Act*, 96 AM. J. INT'L L. 365, 366 (2002).

41. Chekol, *supra* note 38.

42. See Mwangi S. Kimenyi, *An African Union for an Emerging Continent: Reforms to Increase Effectiveness*, BROOKINGS INST. 29, 30 (2015), <https://www.brookings.edu/wp-content/uploads/2016/07/african-union-kimenyi-2.pdf>.

43. See Kelechi A. Kalu, *Resolving African Crisis: Leadership Role for African States and the African Union in Darfur*, 9 AFR. J. CONF. RESOL. 9, 12 (2009).

44. See Segun Joshua & Faith Olanrewaju, *The AU's Progress and Achievements in the Realm of Peace and Security*, 73 INDIA Q. 1, 4 (2017).

45. Chekol, *supra* note 38, at 31.

being on 8 July 2001, having been established under the Constitutive Act (*Hereinafter* the Act).⁴⁶ The approval of the Act signaled a major milestone in the organization's vision, goals and obligations.⁴⁷ Article 33 of the Act, which abrogated the OAU, however provided for its continued existence for a transitional period of one year, or for such a time as the Assembly may decide and also for the devolution of all assets and liabilities to the AU.⁴⁸ The successor organization, the AU was subsequently inaugurated on 9 July 2002,⁴⁹ and within one year, the Constitutive Act was drafted, circulated, and completed.⁵⁰

The AU was seen as that long-sought face of Africa's unity, integration, and development, and importantly, as a departure from the lackluster character of the OAU. Scholars such as Adeyeye, for instance, have noted that while the need to overhaul the OAU was instructive to the formation of the AU, other factors such as "the quest for political dominance of Africa's political affairs," and "the near-perfect union of the EU," contributed to the emergence of the organization.⁵¹ In fact, for scholars such as Africa and Pretorius, the transformation of the OAU into AU and the approval of the Constitutive Act, didn't just provide the organization with new security architecture and confidence, it importantly accorded it a better standing and acceptance in the international community.⁵² The organization retained some of the principles of its predecessor such as emphasizing the sovereignty of member-states, non-interference in their internal affairs, non-use of force, as well as a tendency towards a peaceful settlement of disputes and the notion of "African Solution to African Problems."⁵³ In addition, it was strengthened in a number of ways. For instance, as compared to the OAU which was largely state-centric, the AU was designed in the mold of a regional organization

46. See generally *Constitutive Act of the African Union*, *supra* note 10.

47. See Abiodun Oluwadare, *The African Union and Conflict in Mali: Extra-regional Influence and the Limitations of a Regional Actor*, 3 AFR. J. GOVERNANCE & DEV. 106, 109 (2014).

48. See generally Tiyanjana Maluwa, *Ratification of African Union Treaties by Member States: Law Policy and Practice*, 13 MELBOURNE J. INT'L L. 2, 35 (2012); See T. Maluwa, *From the Organisation of African Unity to the African Union: Rethinking the Framework for Inter-State Cooperation in Africa in the Era of Globalisation*, 4 UNI. BOTS. L.J. 5, 30 (2007).

49. Maluwa, *supra* note 48, at 14.

50. Packer & Rukare, *supra* note 40, at 371.

51. See Joel Adelusi Adeyeye, *A Comparative Analysis of the Charter of the Organisation of African Unity (OAU) and the Constitutive Act of the African Union (AU)*, 6 GRONINGEN J. INT'L L. 215, 222 (2018).

52. See Sandy Africa & Rentia Pretorius, *South Africa, the Africa Union and the Responsibility to Protect: The Case of Libya*, 12 AFR. HUM. RTS. L.J. 394, 405 (2012).

53. Oluwadare, *supra* note 47, at 109.

to pursue social development and economic integration.⁵⁴ Also, radical changes were made in terms of the objectives and principles of the organization, emphasizing sovereign equality, interdependence, prohibition of the use of force and peaceful co-existence and resolution of conflicts.⁵⁵ Additionally, the organization introduced novel instruments of continental engagement, including a common defense policy and the right to intervene in a member state, as well as the promotion of democratic principles, human rights, and the rule of law.⁵⁶

While the organization has recorded a number of successes, it has also been at the center of needless controversies. Notable amongst this, was its position on the arrest warrant issued by the International Criminal Court (ICC) on erstwhile Sudanese, President, Omar Al-Bashir,⁵⁷ and its resolution that African states shouldn't cooperate with the ICC with respect to executing the warrant in question.⁵⁸ Nonetheless, the responsibility to maintain peace and security on the continent rests squarely on the organization. This is especially given the wider distrust and lack of confidence in the role of outsiders.⁵⁹ However, the huge expectations that followed the formation of the organization have been impeded by its inability to address the scourge of armed conflicts which have become the bane of the continent. The dilemmatic situation in which the organization has found itself in the Tigray conflict brings to the fore years of challenges with respect to maintaining peace and security on the continent. An examination of its main legal framework will show the complicated nature of the current state of affairs.

54. Adeyeye, *supra* note 51, at 236.

55. *Id.* at 237.

56. *Id.* at 238.

57. See Eki Yemisi Omorogbe, *The Crisis of International Criminal Law in Africa: A Regional Regime in Response?*, 66 NETH. INT'L L. REV. 287, 288 (2019).

58. See Sascha-Dominick Bachmann & Naa A. Sowatey-Adjei, *The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?*, 29 WASH. INT'L L.J. 247, 250 (2020); See Dire Tladi, *The African Union and International Criminal Court: The Battle for the Soul of International Law*, 34 S. AFR. YEARBOOK INT'L L. 57, 57 (2009).

59. See Jonathan Fisher, *Hands Off Ethiopia: Partiality, Polarisation and Ethiopia's Tigray Conflict*, 14 GLOB. RESP. TO PROTECT 28, 31 (2022).

B. *Legal Framework Underpinning the AU's Right of Intervention*

The AU mainly derives its powers from the Constitutive Act⁶⁰ which provides for its establishment,⁶¹ objectives,⁶² principles,⁶³ and general structure.⁶⁴ Commenting on the objectives, Magliveras and Naldi notes that they aren't viewed as "ambitious," but that "*they reflect rather the current status of developments in African continent, including notably promoting respect for human rights and recognition of the democratic system.*"⁶⁵ There are a number of understandings behind the establishment and existence of the AU. These include a knowledge of the struggles for political independence, human dignity, and economic emancipation waged across the different nationalities on the continent—a common vision of a united and strong Africa; the consciousness that conflict on the continent is a major impediment to socioeconomic development—and a determination to promote and protect human rights, consolidate democratic institutions and ensure good governance and rule of law.⁶⁶ A clear distinction between the organization and its predecessor is its most remarkable function thus far, i.e., the right to intervene in the domestic affairs of member-states.⁶⁷ Article 4 (h) of the Act provides 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.*"⁶⁸ This provision is strengthened by Article 4 (j) which notes "*the right of Member States to request from the Union in order to restore peace and security.*"⁶⁹ This right operates as an exception to the general prohibition of the use of force in international law.⁷⁰ It also represents a new understanding on the continent, shifting from unqualified respect for a state's sovereignty to the important need to protect the people as a part of the continent's security management

60. See generally *Constitutive Act of the African Union*, *supra* note 10.

61. *Id.* at art. 2.

62. *Id.* at art. 3.

63. *Id.* at art. 4.

64. *Id.* at arts. 5-7.

65. See Konstantinos D. Magliveras & Gino J. Naldi, *The African Union: A New Dawn for Africa?*, 51 INT'L & COMP. L.Q. 415, 416 (2002).

66. *Constitutive Act of the AU*, *supra* note 10, at 2-3; See Ben Kioko, *The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention*, 85 INT'L REV. RED CROSS 807, 807 (2003).

67. Oluwadare, *supra* note 47, at 109.

68. *Constitutive Act of the AU*, *supra* note 10, at art. 4(h).

69. *Id.* at art. 4(j).

70. See Dan Kuwali, *The End of Humanitarian Intervention: Evaluation of the African Union Right of Intervention*, 9 AFR. J. CONF. RESOL. 41, 43 (2009).

framework.⁷¹ It also signaled a shift from the policy of non-interference to non-indifference.⁷² It reflects the AU's recognition of the concept of "Responsibility to Protect" (R2P), a developing notion which states that that the international community has an obligation to protect the civilian population from mass atrocities where a sovereign state has abandoned its responsibilities in this respect.⁷³ The Protocol on Amendment to the Act, adopted in February 2003, has further amended Article 4 (h) by adding the following—"as well as a serious threat to legitimate order or to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council."⁷⁴

In 2002, the AU approve a Solemn Declaration on a Common African Defense and Security Policy (CADSP) as a declaration anchored on the notion of human security, as against the approach which favored security as the business of the state.⁷⁵ It also reflects the norms which constitute Africa's peace and security framework.⁷⁶ This was followed up by the establishment of the Peace and Security Council (PSC) in 2003, to operate as the AU's main agency for executing the right of intervention.⁷⁷ The PSC was established under the Protocol Relating to the Establishment of Peace and Security Council of the African Union (*Hereinafter* PSC Protocol).⁷⁸ Established pursuant to Article 5 (2) of the Act, the PSC encompasses a "collective security and early warning arrangement," designed to "facilitate timely and efficient response to conflict and crisis situations in Africa."⁷⁹ Additionally, as part of the framework, the Protocol on Amendment allows the PSC to make a recommendation to

71. Oluwadare, *supra* note 47, at 109.

72. Africa & Pretorious, *supra* note 52, at 405.

73. Kuwali, *supra* note 70, at 43.

74. African Union [AU], *Protocol on Amendments to the Constitutive Act of the African Union*, art. 4(h) (July 11, 2003), https://au.int/sites/default/files/treaties/35423-treaty-0025_-_PROTOCOL_ON_THE_AMENDMENTS_TO_THE_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION_E.pdf.

75. See Ademola Jegede, *The African Union Peace and Security Architecture: Can the Panel of the Wise make a Difference?*, 9 AFR. HUM. RTS. L.J. 409, 410 (2009).

76. *Id.*

77. Africa & Pretorious, *supra* note 52, at 405.

78. See African Union [AU], *Protocol Relating to the Establishment Of Peace And Security Council Of The African Union* art. 2 (July 9 2002), https://au.int/sites/default/files/treaties/37293-treaty-0024_protocol_relating_to_the_establishment_of_the_peace_and_security_council_of_the_african_union_e.pdf; Jeremy Sarkin, *The Role of the United Nations, the African Union and Africa's Sub-regional Organisations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect*, 53 J. AFR. L. 1, 21 (2009).

79. *Protocol Relating to the Establishment of Peace and Security Council of the African Union*, *supra* note 78.

the Assembly, on the necessity of intervention on the ground of “a serious threat to legitimate order to restore peace and stability,” when it is impracticable to do so on the grounds of “war crimes, genocide and crimes against humanity.”⁸⁰ This confers far-reaching powers on the PSC. The AU deals with problems within its member-states through the PSC, the Chairperson of the Commission (who plays a major political role in this respect), and the commissioner for peace, security and political affairs.⁸¹ As a fifteen-member entity, the PSC implements peace-making and defense policies, monitors peace missions, and recommends interventions when a situation satisfies the requirements of Article 4 (h) of the Act.⁸² However, rather than intervention, much of the activities of the PSC in recent years have been in addressing issues of unconstitutional change of government in member-states. Examples include the 2013 case of Egypt following the *coup d'état* in the country; similar steps were also taken in Sudan and Mali, in 2019 and 2020, respectively.⁸³ Much of the PSC's incapacitation revolves around two issues—lack of internal cohesion and financial constraints. Whereas its decisions require a simple majority, this rarely happens, given the challenge of lack of unity from within, in which its members end up supporting the country which it ought to take action against.⁸⁴ This is also connected to the problem of non-adherence to the criteria for getting a seat on the PSC in line with the Protocol.⁸⁵ While the Protocol states that PSC members should commit themselves to the principles of the AU, contribute to the maintenance of peace and security on the continent, and respect constitutional governance, the rule of law, and human rights, the reality is that countries scramble for membership of the PSC, to the end that they may deploy it as a vehicle to shield themselves from external scrutiny.⁸⁶ The weakness of the PSC with respect to the Tigray conflict is evident in the fact that from November 2020 to March 2021, the PSC held nineteen meetings much of which focused on other conflicts such as those of the Central African Republic (CAR), Nigeria, Sudan, and Somalia.⁸⁷ Interestingly,

80. Kioka, *supra* note 66, at 807.

81. See Gurjit Singh, *The African Union and the Tigray Crisis*, OBSERVER RSCH. FOUND. (Apr. 26, 2021), <https://www.orfonline.org/expert-speak/the-african-union-and-the-tigray-crisis/>.

82. *Id.*

83. *Id.*

84. *Id.*

85. See *With Four New Members, Is the PSC at a Crossroad?*, INST. FOR SEC. STUD. (Feb. 21, 2019), <https://issaffrica.org/pscreport/psc-insights/with-four-new-members-is-the-psc-at-a-crossroads>.

86. *Id.*

87. Singh, *supra* note 81.

these were conflicts lacking the level of urgency clearly associated with the conflict in Tigray. Furthermore, due to inadequate funding, the organization's Peace Fund and Standby Force isn't fully functional, the result being that most times its activities are often overtaken by the interventionist effort of foreign powers.⁸⁸ The PSC facilitates the Mechanism on Conflict Prevention, Management and Resolution (MCPMR) on the continent. The Constitutive Act initially didn't provide for an MCPMR as the OAU MCPMR and the Cairo Agenda for Action on MCPMR weren't taken into consideration.⁸⁹ Subsequently, however, the principles and objectives of the Cairo Agenda were made a part of the objectives and principles of the AU in line with Section 5 (2) of the Act.⁹⁰

Furthermore, the PSC "*promote peace, security, and stability in Africa,*"⁹¹ "*anticipate and prevent conflicts,*" and in the event that it has occurred, "*undertake peace-making and peacebuilding functions for the resolution of these conflicts.*"⁹² In discharging its obligation, the PSC is to be guided by the principles enshrined in the Constitutive Act, the UN Charter as well as the Universal Declaration of Human Rights (UDHR) 1948.⁹³ Importantly, and in addition to other guiding principles, it is to be guided by, "*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, in accordance with Article 4 (h) of the Constitutive Act,*"⁹⁴ as well as, "*the right of Member States to request intervention from the Union in order to restore peace and security, in accordance with Article 4 j of the Constitutive Act.*"⁹⁵

Additional functions of the PSC include "*early warning and preventive diplomacy*";⁹⁶ "*peace support operations and intervention pursuant to Article 4 (h) and (j) of the Constitutive Act*";⁹⁷ "*humanitarian action and disaster management*";⁹⁸ and "*any other function as may be*

88. *Id.*

89. See Isaac O. Albert, *The African Union and Conflict Management*, 32 AFR. DEV. 47, 47-48 (2007).

90. *Id.* at 48.

91. *Protocol Relating to the Establishment of Peace and Security Council of the African Union*, *supra* note 78, at art 3(a).

92. *Id.* at art. 3(b).

93. *Id.* at art. 4.

94. *Id.* at art. 4(j).

95. *Id.* at art. 4(k).

96. *Id.* at art. 6(b).

97. *Id.* at art. 6(d).

98. *Id.* at art. 6(f).

decided by the Assembly."⁹⁹ Given the need to finance the AU's peace and security projects, the PSC Protocol provide for a Special (Peace) Fund, to be a standing pool from which the AU can draw funds to meet emergency situations.¹⁰⁰ While the fund was established in 1993 under the OAU Mechanism regime in which 6% of the OAU regular budget is devoted to it, under the AU it is financed by the organization's regular budget, arrears of contributions, voluntary contribution from member-states, and private sources from within and outside the continent.¹⁰¹ The Special (Peace) fund has however been abysmally financed necessitating the AU in 2012 to increase the statutory transfer from the organization's regular budget from 6% to 12%, to avoid the crippling of its peace and security objectives.¹⁰² Within the APSA framework, the AU has condemned cases of unconstitutional change of government on the continent, suspended errant member-states, and deployed peace missions in countries such as Burundi, Comoros, Sudan, and Somalia.¹⁰³

For the PSC to effectively carry out its mandate, especially with respect to peace support operations and intervention, the PSC Protocol provides for the establishment of an "African Standby Force," which shall be composed of civilian and military personnel and ready for deployment at appropriate notice.¹⁰⁴ The force has a number of functions viz, "*intervention in a Member State in respect of grave circumstances or at the request of a Member State in order to restore peace and security, in accordance with Article 4 (h) and (j) of the Constitutive Act.*"¹⁰⁵ It functions also extend to "*preventive deployment in order to prevent (i) a dispute or conflict from escalating, (ii) an ongoing violent conflict from spreading to neighboring areas or states, (iii) the resurgence of violence after parties to a conflict have reached an agreement,*"¹⁰⁶ and "*humanitarian assistance to alleviate the suffering of civilian population in conflict areas and support efforts to address major natural disasters.*"¹⁰⁷ In discharging these functions, the force is expected to

99. *Id.* at art. 6(g).

100. Oluwadare, *supra* note 47, at 111.

101. *Id.*

102. *Id.*

103. *Id.* at 110.

104. *Protocol Relating to the Establishment of Peace and Security Council of the African Union*, *supra* note 78, at art. 13(1).

105. *Id.* at art. 13(3)(c).

106. *Id.* at art. 13(3)(d).

107. *Id.* at art. 13(3)(f).

cooperate the UN and its agencies, relevant international and regional organizations as well as Non-Governmental Organizations (NGOs).¹⁰⁸

The Act is the first treaty to empower a regional organization with the right of intervention in the internal affairs of member-states, especially against the backdrop of the traditional notion of non-interference in the territorial integrity of countries as obtainable under international law.¹⁰⁹ A number of reasons have been adduced as the basis for including such a powerful tool in the Act. According to Kioko, the inclusion of this right was motivated by the failure of its predecessor organization the OAU, to intervene when glaring gross human rights violations were committed on the territory of African countries in times past.¹¹⁰ Speaking in a similar light, Abatan and Spies add that granting the organization such a right is based on the acknowledgment in Article 4 (h) that Africa warehouses a large share of grave circumstances across the globe, as well as the fact that humanitarian crisis can be linked to violence perpetrated by sitting governments against their own people.¹¹¹ On his part, Farmer notes that Article 4 (h) is simply a demonstration of the organization's view of sovereignty, i.e., that it is a responsibility that a state has and which is lost whenever it fails to live up to its responsibilities.¹¹² The AU's right of intervention is also strengthened by the UN Charter. This is extensively captured in Article 52, which provides for a system of regional arrangements in maintaining internal peace and security.¹¹³

The framework in Article 4 (h) puts in context the AU's right to intervene in the Tigray conflict. In line with Article 4 (h) of the Act, the AU has powers to either intervene unilaterally in a member state or do so based on a request by a member state.¹¹⁴ The meaning is that with respect to this conflict, the AU can either intervene unilaterally or wait on the Ethiopian government to submit a request as a member state of the organization. Given its well-stated objective of law enforcement action towards crushing the rebellion by the TPLF, it is most unlikely that the Ethiopian government would submit such a request. Clearly, this leaves the organization with the sole option of relying on its Assembly

108. *Id.* at art. 13(4).

109. Kioko, *supra* note 66, at 807.

110. *Id.* at 812.

111. See Ella Abatan & Yolanda Spes, *African Solution to African Problems? The AU, R2P and Cote d'Ivoire*, 23 S. AFR. J. INT'L AFFAIRS 21, 21 (2016).

112. See Leila J. Farmer, *Sovereignty and the African Union*, 4 J. PAN. AFR. STUD. 93, 99 (2012).

113. See Christopher J. Borgen, *The Theory and Practice of Regional Organisation Intervention in Civil Wars*, 26 N.Y.U. J. INT'L L. & POL. 797, 799 (1994).

114. Albert, *supra* note 89, at 52.

authorizing unilateral intervention. Whereas this right is textually clear, the Tigray conflict mirrors all of the practical challenges. Not only does it put the organization in the difficult position of determining the basis for intervention, there are also issues of how to ensure effective intervention. As Cilliers and Sturman notes “a failed intervention can do as much damage as failing to intervene at all.”¹¹⁵

IV. EXERCISING THE RIGHT OF INTERVENTION IN THE TIGRAY CONFLICT—KEY OBSTACLES FOR THE AU

A. *Problem of Conceptual Clarity with Respect to the Grounds for Intervention*

The AU’s right of intervention framework encompasses a number of actors. First in line is its main decision-making organ, i.e., the Assembly, made up of Heads of States and Governments or their representatives,¹¹⁶ which also operates as the supreme organ of the organization.¹¹⁷ It meets at least once in a year in an ordinary session; however, at the request of a member-state, approved by two-third majority of its members it can convene an extraordinary session.¹¹⁸ Generally, the Assembly takes its decision by a consensus, but where that fails, a two-third majority vote of member-states will be sufficient.¹¹⁹ The Assembly can only take a decision on the grounds enumerated in the Constitutive Act, i.e., the grounds of “war crimes, genocide and crimes against humanity.”¹²⁰ The Protocol on Amendment provides an additional ground which is a “a serious threat to legitimate order or to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.”¹²¹

In recent times, exercising the right of intervention have been fraught with issues, which today resonates with the Tigray conflict. First, is the issue of lack of clarity on the meaning of and ground for intervention. As Dyani-Mhango notes, there is lack of clarity with respect to the meaning of the right of intervention, especially as the Constitutive Act doesn’t

115. See Jakkie Cilliers & Kathryn Sturman, *The Right Intervention—Enforcement Challenges for the African Union*, 11 AFR. SEC. REV. 28, 30 (2002).

116. *Constitutive Act of the AU*, *supra* note 10, at art. 6(1).

117. *Id.* at art. 6(2).

118. *Id.* at art. 6(3).

119. *Id.* at art. 7(1).

120. *Id.* at art. 4(1).

121. *Protocol on Amendments to the Constitutive Act of the African Union*, *supra* note 74.

provide a relevant definition.¹²² What the Act simply says is that the AU can exercise the right of intervention when international crimes, i.e., crimes against humanity, war crimes, and genocide are committed. Whereas, media reports points to possible commission of acts amounting to war crimes and crimes against humanity on both sides in the Tigray conflict,¹²³ the Constitutive Act doesn't define these crimes; rather, they are simply defined in the Rome Statute of the ICC.¹²⁴ In line with Article 85 (5) of Additional Protocol I of 1977, grave breaches of the 1949 Geneva Conventions are also regarded as war crimes.¹²⁵ This lack of a definition of such egregious crimes, especially ones which undermine the exercise of such a powerful right, must be considered a major omission.

Based on this vacuum, legal scholars have interpreted this right as conferring power on the AU to deploy use of force.¹²⁶ Williams for example argues that the intervention envisaged under Article 4(h) follows only one interpretation — the authorization of use of military force for humanitarian protection without cognizance to the consent of the host state and prior to the United Nations Security Council (UNSC) resolution.¹²⁷ This he labels a sort of “enforcement action,” different from the regular peacekeeping support action provided for under Article 7 (c) of the Protocol.¹²⁸ William's argument means that such intervention is likely to be in confrontation with the prohibition on the use of force under Article 2 (4) of the UN Charter, as well as Article 53 (1) which provides that authorization by the UNSC is required to deploy regional arrangement for the securing of international peace.¹²⁹ Exceptions to this

122. See Ntombizozuko Dyani-Mhango, *Reflections on the African Union's Right to Intervene*, 38 BROOK J. INT'L L. 1, 2 (2012).

123. Off. of U.N. High Comm'r for Hum. Rts., Rep. of the Ethiopian Hum. Rts. Comm'n (2021) at 5; *Ethiopia Eritrean Troops Massacre of Hundreds of Axiom Civilians May Amount to Crime Against Humanity*, AMNESTY INT'L (Feb. 26, 2021), <https://www.amnesty.org/en/latest/news/2021/02/ethiopia-eritrean-troops-massacre-of-hundreds-of-axum-civilians-may-amount-to-crime-against-humanity/> [hereinafter AMNESTY INTERNATIONAL].

124. See Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90, at arts. 6, 7, and 8.

125. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 609, at art. 85(5).

126. AMNESTY INT'L, *supra* note 123, at 12.

127. See Paul D. Williams, *The Peace and Security Council of the African Union: Evaluating an Embryonic International Institution*, 47 J. MODERN AFR. STUD. 603, 611 (2009).

128. *Protocol Relating to the Establishment of Peace and Security Council of the African Union*, *supra* note 78, at art. 7(c).

129. U.N. Charter, *supra* note 9, at art. 2, ¶ 4 (stating that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

rule are on the ground of self-defense provided in Article 51¹³⁰ and the “enemy state clause” in Article 53 (1) of the UN Charter.¹³¹ However, developments in AU’s intervention practice would suggest that the organization has successfully overcome this challenge and established its authority to act, independent of UNSC authorization. As Allain correctly observed, this is shown in “*the precedent-setting intervention of West African troops in both Liberia and Sierra Leone without a Security Council mandate.*”¹³² The idea was that African states had realized the need to take their destiny into their own hands.¹³³

Toeing the same line as Williams, Ndombana argues that, “*the Act permits humanitarian military intervention in respect to breaches of international criminal law.*”¹³⁴ Of course, the international criminal laws which Ndombana refers to here, are the grounds for intervention in the Constitutive Act which are “*war crimes, genocide, and crimes against humanity.*”¹³⁵ He further notes that this is backed up by Article 4 (j) of the PSC Protocol which gives the AU the right to intervene in any member state based on a decision of the Assembly and in respect of “*war crimes, genocide and crimes against humanity.*”¹³⁶ He additionally argues that this is more so given that the PSC has the mandate of humanitarian action and disaster management in conflicts,¹³⁷ a mandate that is to be carried out under the auspices of the African Standby Force.¹³⁸ According to Article 4 (h), circumstances warranting the AU’s intervention should be

independence of any state, or in any manner inconsistent with the purposes of the United Nations”). This is also buttressed by Article 103 which states that “in the event of a conflict between the obligations of members of the United Nations under the present charter and their obligations under other international agreements, their obligations under the present charter shall prevail.” *Id.* at art. 103. See Cedric de Coning, *Peace Enforcement in Africa: Doctrinal Distinctions Between African Union and United Nations*, 38 CONTEMPORARY SEC. POL’Y. 145, 149 (2017).

130. See U.N. Charter, *supra* note 9, at art 51. (stating that “[n]othing in the present charter shall impair the right of individual or collective self-defense, if an attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain internal peace and security”).

131. *Id.* at art. 53, ¶ 1

132. See Jean Allain, *The True Challenge to the United Nations System of Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union*, 8 MAX PLANCK Y.B. UNITED NATIONS L. ONLINE 237, 260 (2006).

133. *Id.*

134. Ndombana, *supra* note 9, at 1167.

135. *Id.*

136. *Id.* at 1168.

137. *Protocol Relating to the Establishment of Peace and Security Council of the African Union*, *supra* note 78, at art. 6(f).

138. *Id.* at art. 13(1).

“grave,”¹³⁹ but the Act doesn’t define any of these grounds and so determining a standard for intervention becomes difficult. Dyani-Mhango also reaffirms this point stating that the Act doesn’t define these crimes, as the drafters presumed this was needless since these grounds have been defined in the Rome Statute of the ICC, as well as the statutes of international tribunals such as the International Criminal Tribunal for Yugoslavia (ICTY)¹⁴⁰ and International Criminal Tribunal for Rwanda (ICTR).¹⁴¹ She however notes that the problem with the AU’s reliance on the Rome Statute is that while the statute provides a procedure to be followed before an indictment for any of these crimes, the Constitutive Act doesn’t provide for similar procedures.¹⁴² She correctly notes that what ought to be the case is for a framework establishing the commission of an international crime under the Constitutive Act, before any talk of intervention.¹⁴³

The views of Ndombana and Dyani-Mhango reflect the challenges with intervention in the Ethiopia-Tigray conflict. While Ndombana’s position on the Act permitting humanitarian military intervention is certain to create bigger problems, that of Dyani-Mhango appears closer to the current understanding.¹⁴⁴ Supporting Dyani-Mhango’s position, this article argues that while one may draw insights from the definition of “*war crimes, genocide and crimes against humanity*” from the Rome Statute, applying such a standard may become controversial, as the legality of an intervention in a domestic conflict, based on grounds in a regional instrument, but supported with interpretations from a far-flung international treaty, may generate serious bad blood on the continent and further worsen the situation. Clearly, meeting the threshold of “*war crimes, genocide and crimes against humanity*” as a basis for intervention in this conflict would be problematic given the lack of a procedure for doing so as noted by Dyani-Mhango.¹⁴⁵ As Gumedze has rightly observed, the AU will always be in a tough situation in exercising this right in any member state and would really require a strong case to bring Article 4 (h) into operation.¹⁴⁶ Thus, as establishing the commission of international crimes is likely to be difficult, following Ndombana’s

139. See Sabelo Gumedze, *The African Union and Responsibility to Protect*, 10 AFR. HUM. RTS. J. 135, 149 (2010).

140. S.C. Res. 827 at ¶ 3 (May 25, 1993).

141. S.C. Res. 955 at ¶ 4 (Nov. 8, 1994).

142. Dyani-Mhango, *supra* note 122, at 14.

143. *Id.* at 15.

144. See generally *id.*

145. *Id.* at 14.

146. Gumedze, *supra* note 139, at 149.

position of humanitarian military intervention is therefore bound to be a non-starter. One argument that can however be made is that whereas making a case for intervention on “war crimes, genocide and crimes against humanity” appears remote, doing so on the ground of “a serious threat to legitimate order or to restore peace and stability” may be within reach, though the problem of applicable standards still lingers.¹⁴⁷ From the reports on ground, which this article has also established, the conflict has indeed become “a serious threat to legitimate order.” In addition, there is also an urgent need to “restore peace and stability.”¹⁴⁸

It has been argued that the Constitutive Act’s drafting committee felt that as these crimes are already defined in relevant international criminal statutes, crafting Article 4 (h) the way it is, brings it in compliance with international law.¹⁴⁹ The challenge with this assertion is that it raises the issue of whether crimes defined in an international treaty, not directly binding on a regional organization, can indeed be used as a legal basis for binding sovereign countries to respect a regional organization’s right of intervention in their affairs. The Constitutive Act as a legal document ought to have defined the exact crimes for which member-states would be deemed to have crossed the red line, and which would serve as legal justifications for any action by the AU. Also, in defining such crimes, the organization would take into consideration the peculiar nature of conflicts on the continent, being guided by characteristics that may help separate certain kinds of acts from the international crimes of war crimes, genocide, and crimes against humanity. This is especially in light of the high threshold required to establish the commission of these crimes as well as the causative factors.

Blanketly stating war crimes, genocide, and crimes against humanity simply plays into the hands of bad leaders on the continent, who may engage in systematic violence against their people, even when such may fall short of being defined as a war crime, genocide, or crimes against humanity. One can argue that this is at the heart of the AU’s inability to intervene in the Tigray conflict. Notwithstanding media reports about possible commissions of international crimes in the conflict, it is difficult to firmly establish these crimes, given the high threshold required. In the Tigray conflict, there has been widespread violence and systematic use of violence against the civilian population; however, a lack of precise definition under the Act makes it difficult for the AU to act unilaterally,

147. *Id.* at 159.

148. *Id.*

149. Dyani-Mhango, *supra* note 122, at 13.

or for it to be compelled to act. A precise definition of crimes which would trigger a right of intervention also has inherent benefits of providing normative standards which can shape the rules of engagement of the armed forces of member-states and based on which national governments can hold their forces to account.

B. Possibilities of Intervention on the Basis of Obligation to Protect Human Rights

While the above obstacles remain, there is a need to examine whether there is any other basis which can be argued as a possible justification for intervention by the AU, especially within the urgent need to intercept and address ‘*a serious threat to legitimate order or to restore peace and stability*,’ that has been clearly established in this conflict. One area to look at, is the obligation to protect human rights at all times. According to Simma, “*an impressive network of rules and institutions, both at the universal and regional levels, have come into being*” as a result of the fact that serious violations of human rights have become a matter of international concern.¹⁵⁰ This obligation straddles international, regional, and domestic law, applying to organizations and persons. While it may be legally challenging to make a case for the AU’s intervention in this conflict on the basis of ‘*war crimes, genocide and crimes against humanity*,’ intervention becomes a necessity, an urgent one at that, with respect to the obligation to protect of human rights. This is based on a number of factors. To start with, human rights are today of universal application. They are indivisible, interdependent, and interrelated, as captured in the Vienna Declaration and Programme of Action which provides that:

All human rights are universal, indivisible, interdependent, and interrelated. The internal community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of regional and national peculiarities and various historical, cultural, and religious backgrounds must be borne in mind, it is the duty of states regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁵¹

150. See Bruno Simma, *NATO, The UN and The Use of Force: Some Legal Aspects*, 10 *EURO. J. INT’L L.* 1, 1 (1999).

151. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993).

Documents such as the UDHR,¹⁵² though initially deemed not to impose a binding obligation on states, have since attained the status of Customary International Law (CIL).¹⁵³ In addition, the practice of the UNSC has shown that under certain circumstances, human rights violations may be regarded as threats to peace, while egregious human rights violations may be viewed as breaches of the peace.¹⁵⁴ Also, human rights norms form a major part of the mandate of the AU, a point which scholars have highlighted. While Stefiszyn notes that “*human rights are a thread running through the list of objectives that are outlined in the Constitutive Act of the AU*,”¹⁵⁵ Ndombana on his part states that both the preamble and substantive provisions of the AU treaty integrates political, economic, and human rights priorities.¹⁵⁶ A perusal of the Constitutive Act will reveal these norms clothed in objectives such as to—

- Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;¹⁵⁷
- Promote, peace, security, and stability on continent;¹⁵⁸
- Promote democratic principles and institutions, popular participation and good governance;¹⁵⁹
- Promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and relevant human rights instruments;¹⁶⁰
- Promote cooperation in fields of human activity to raise the living standards of African Peoples¹⁶¹; and
- Work with relevant international partners in the eradication of preventable disease and the promotion of good health on the continent.¹⁶²

152. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

153. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 95 GA. J. INT’L & COMP. L. 287, 322 (1996).

154. Kuwali, *supra* note 70, at 43.

155. Karen Stefiszyn, *The African Union: Challenges and Opportunities for Women*, 5 AFR. HUM. RTS. L.J. 358, 361 (2005).

156. See Nsongurua J. Ndombana, *Can the Leopard Change its Spot? The African Union Treaty and Human Rights*, 17 AM. UNI. INT’L L. REV. 1177, 1187 (2002).

157. *Constitutive Act of the African Union*, *supra* note 10, at art. 3(e).

158. *Id.* at art. 3(f).

159. *Id.* at art. 3(g).

160. *Id.* at art. 3(h).

161. *Id.* at art. 3(k).

162. *Id.* at art. 3(n).

A similar norm is also seen in the principles of the AU, for instance those dealing with “*respect for democratic principles, human rights, the rule of law and good governance*”.¹⁶³ The recognition under the Constitutive Act is more far-reaching than those of the OAU Charter.¹⁶⁴ To advance these human rights objectives, the AU is required to have an organ with the specific mandate of carrying out the objectives in its Constitutive Act and Charter.¹⁶⁵ The issue is that none of its nine organs has such a mandate.¹⁶⁶ In the analysis already done above, it is clear that wanton human rights violations have taken place in this conflict.

These norms provide a ground for invoking an important function of the PSC under Article 13 of the PSC Protocol i.e., “*humanitarian assistance to alleviate suffering of civilian population in conflict areas and support efforts to address major natural disasters*.”¹⁶⁷ The work of the PSC in this respect is spot on, given that it is expected to be guided by the principles enshrined in the UN Charter as well as the UDHR, in carrying out its functions, amongst which are principles geared towards human rights protection.¹⁶⁸ So far, reports from this conflict have established continuing human rights violations, which has engendered and is engendering a humanitarian crisis. A case in point is the issue of attacks on the civilian population. The TPLF Adviser Fesseha Tessema, who is also a former Ethiopian Diplomat, alleges that civilian sites were being bombed by federal forces, even when the people have committed no wrong and are simply in their homes and churches.¹⁶⁹ The government, on the other hand, posits that its attacks have been on military targets.¹⁷⁰ Amnesty International citing witness accounts, as well as the Human Rights Watch (HRW) report that on 9 November 2020, hundreds of civilians were hacked to death in the Mai Kadra region of western Tigray where much of the fighting has occurred, an incident blamed on fighters loyal to the Tigray leaders.¹⁷¹ These killings now referred to as the “Mai Kadra massacre,” are said to have involved the killing of about 500

163. *Id.* at art. 4(m).

164. See Kithure Kindiki, *The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal*, 3 AFR. HUM. RTS. L.J. 97, 101 (2003).

165. *Id.*

166. *Id.*

167. *Protocol Relating to the Establishment of Peace and Security Council of the African Union*, *supra* note 78, at art. 13, ¶ 3(f).

168. *Id.* at art. 4.

169. See Drury & Woods, *supra* note 24.

170. *Id.*

171. See CNN, *supra* note 21.

civilians in this town which is close to the country's border shared with Sudan.¹⁷² According to HRW, under IHRL the Ethiopian government has the primary obligation of meeting the needs of the people on its territory.¹⁷³

These reports are enough evidence of human rights violations that should trigger a Peace Support Operation under the African Standby Force (ASF). The AU Peace Support Operations are a part of the African Peace and Security Architecture (APSA) and are guided by the Constitutive Act, the Peace and Security Protocol, and the AU's strategies and goals.¹⁷⁴ These stem largely from the sense of shared responsibility and solidarity around a common African identity and the fact that an outbreak of violence in one country is likely to impact others as well as the region.¹⁷⁵ The PSC Protocol also provides that “ . . . regional mechanisms are part of the overall security architecture of the union, which has the primary responsibility for promoting peace, security, and stability in Africa.”¹⁷⁶ The PSC and Chairperson of the AU Commission are therefore expected to work together to harmonize and coordinate the activities of regional mechanisms and work with them to ensure effective partnership based on comparative advantages and prevailing circumstances.¹⁷⁷ Within this framework, sub-regional organizations such as the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), and the Southern Africa Development Commission (SADC) are all building blocks for the APSA.¹⁷⁸ These sub-regional organizations are likely to be major stakeholders, required in the event of an intervention by the AU; meaning that any act of resistance from them would be a key obstacle. A relevant example was the resistance by ECCAS to AU-UN cooperation in peace support operations in the CAR.¹⁷⁹ The body for example saw its micromanagement of the CAR crisis as threatened by the broadening of

172. See Ineke Mules, *Ethiopia: A Timeline of the Tigray Crisis*, DW (Nov. 17, 2020), <https://www.dw.com/en/ethiopia-a-timeline-of-the-tigray-crisis/a-55632181>.

173. See *Ethiopia: Protect People as Tigray Crisis Escalates*, HUM. RTS. WATCH (Nov. 13, 2020, 11:44 AM), <https://www.hrw.org/news/2020/11/13/ethiopia-protect-people-tigray-crisis-escalates>.

174. de Coning, *supra* note 129, at 150.

175. *Id.*

176. Djilo & Handy, *supra* note 11, at 3.

177. *Id.*

178. See RECs, *supra* note 12, at 1.

179. See Tatiana Carayannis & Mignonne Fowles, *Lessons from African Union—United Nations Cooperation in Peace Operations in Central African Republic*, 26 AFR. SEC. REV. 220, 225 (2017).

AU intervention in the central African country.¹⁸⁰ It is likely that a similar scenario may play out, in the event of any AU intervention in the Tigray conflict.

The call for a peace support operation stem from the failure of the PSC to proactively respond to this crisis, in line with its function of “*preventive deployment in order to prevent (i) a dispute or conflict from escalating.*”¹⁸¹ Such human rights-induced intervention would be towards peacekeeping essentially and devoid of any form of military action. This can be seen from the PSC Protocol, which states in Article 13 (4) that African Standby Force, which is to carry out these peace support operations, where appropriate, would be expected to cooperate with the UN and its agencies, as well as other relevant international and regional organizations including NGOs.¹⁸² The first of such peacekeeping mission was carried out in Burundi in May 2003.¹⁸³ Known as the African Union Mission in Burundi (AMIB), it was a ground-breaking event for the organization in terms of the deployment of its architecture to operationalize and maintain peace.¹⁸⁴ By the end of the mission, the AMIB recorded significant success, restoring peace to most parts of the country, save for a region outside the capital city, Bujumbura, where activities of the armed group *Forces Nationales de Liberation* (FNL) meant that peace remained elusive.¹⁸⁵ It has also carried out similar missions in the Darfur region of Sudan as well as in South Sudan.¹⁸⁶

C. *Impediments with Respect to Sovereignty of Member-States*

Whereas exercising the right of intervention is a legal mandate of the AU, the right clashes headlong with the concept of sovereignty. Over the years, a critical pushback against the right of intervention has been the important need to preserve the sovereign authority of member-states, in exercising control over their domestic affairs, especially in regard to the exclusive right to carry out domestic law enforcement actions.¹⁸⁷ In purely

180. *Id.*

181. *Protocol Relating to the Establishment of Peace and Security Council of the African Union*, *supra* note 78, at art. 13(3)(d).

182. *Id.* at art. 13(4).

183. See Jashobanta Pan, *African Union's Intervention Sudan: Importance and Effectiveness*, 2 *INSIGHT ON AFRICA* 113, 117 (2010).

184. *Id.*

185. *Id.*

186. *Id.*

187. See Anyway Sithole, *The African Union Peace and Security Mechanism's Crawl from Design to Reality: Was the Libyan Crisis a Depiction of Severe Limitations?*, *ACCORD* (June 11,

legal terms, a country's leadership is fundamentally bound by the provisions of its Constitution. The tension between an exercise of this right and the concept of sovereignty manifest in several ways. As a starting point, while it seems desirable to protect the human rights of a people trapped in an armed conflict, a fundamental problem is that undermining a country's sovereignty in the process amounts to infringing on Articles 2 (1), 2 (4) and 2 (7) of the UN Charter.¹⁸⁸ Dating back to the days of the OAU, a lack of unity has been a fundamental problem amongst African states, who prefer compromise politics rooted in their emphasis on the Westphalian concept of sovereignty which focuses on states as holders of rights devoid of duties.¹⁸⁹ Flowing from this, member-states aren't forthcoming about devolving their sovereignty to the AU as a supranational body, something which has accounted for the organization's inability to achieve a common position on critical issues.¹⁹⁰ A case in point is Libya, where the organization simply condemned the 'disproportionate use of force against civilians,'¹⁹¹ while its roadmap to peace didn't materialize because it couldn't attain a common position on how to resolve the crisis.¹⁹² National sovereignty often takes precedence over the organization's mandate, with most governments on the continent still committed to the old principle of "non-interference."¹⁹³

The meaning is that though the AU has a legal mandate, it is still an organization whose ability to act, heavily depends on the actions and contributions of its member-states. It is an amalgam of several states, the implication being that to assemble an interventionist force, it has to rely on troops contributed by these countries. These states, though sovereign, are for the most part entities with weak security infrastructure, political stability, and a of lack democratic norms, which are all ingredients required to be able to effectively participate in regional agendas. A significant number of them don't even exercise full sovereign powers over their territory, as they battle insurgencies, terrorism, and all forms of internal security challenges. Also, the reality is that, for regional organizations like the AU, their ability to function and deliver on their mandate is more often shaped by geopolitical influences and less legal

2012), <https://www.accord.org.za/ajcr-issues/the-african-union-peace-and-security-mechanisms-crawl-from-design-to-reality/>.

188. Kuwali, *supra* note 70, at 44.

189. See Sithole, *supra* note 187, at 13.

190. *Id.*

191. See Alex Perry, *Africa's Feeble Response to Libya*, TIME (Feb. 26, 2011), <https://world.time.com/2011/02/26/africas-feeble-respond-to-libya/>.

192. Sithole, *supra* note 187, at 123-24.

193. *Id.* at 125.

force. Politics govern everything regional organizations do, even when they act legally. In most situations, such organizations rely heavily on their member-states to achieve stated objectives. It is therefore unimaginable that a regional organization will exercise more power or capacity than its constituent states.¹⁹⁴

Applying this in the context of the Tigray conflict, it is clear that for the AU to act, it will require active and extensive support of powerful countries within its fold, whose weight would be highly instructive in providing that all-important political and military support. Many of these countries are likely to interpret the actions of the Ethiopian government in Tigray, through the dual prism of domestic law enforcement and the sovereignty of the Ethiopian State. They are certain to toe the line that the Ethiopian government is simply exercising its sovereign powers against the aggression of the TPLF and, as such, are unlikely to back any intervention by the AU. While the AU can be comforted by contemporary interpretations of the doctrine of sovereignty, this doesn't appear to put the matter to rest. Contemporary understanding of the doctrine provides that it is a state's responsibility to protect its citizens, and when it fails in this regard, it automatically triggers intervention by the comity of states, inclusive of military intervention.¹⁹⁵ This is because most states' demonstration of their responsibility in protecting their citizens often commences by way of domestic law enforcement action against perceived enemies of the state. For regional organizations such as the AU, the quandary is how best to determine the point where a constitutionally-sanctioned domestic law enforcement action crosses the line and becomes a state's use of violence, which becomes a ". . . *serious threat to legitimate order*," resulting in human rights violations and requiring outside intervention. What this implies is that reconciling the AU's right of intervention with a member state's sovereignty over its domestic affairs is certain to remain problematic for a long time.

D. The AU's Relationship with Its Host and the Problem of Regional Politics

Ethiopia's relationship with the AU presents a unique challenge to the organization's ability to exercise its right of intervention. Any keen observer will know that this relationship goes beyond that of just a member-state and a regional organization, rather Ethiopia is more of a "mother nation" to the AU. Ethiopia largely embodies the AU, a fact

194. *See generally id.*

195. Kuwali, *supra* note 70, at 46.

which puts in perspective the dilemma of the latter. This point can be approached from two angles, i.e., the formation of the AU and its geographic location of more than fifty years. In 1963, when heads of African states signed the OAU Charter, Ethiopia was a founding member and an important one, with the leadership of Emperor Haile Selassie playing a rather critical role.¹⁹⁶ Locating the OAU in Addis Ababa was therefore a major diplomatic victory for Emperor Selassie, who, following his historic speech at the League of Nations in 1936, had long been at the forefront of promoting international law.¹⁹⁷

Also, the fact that the Commission's headquarters are located in Addis Ababa, the Ethiopian capital, speaks volume and is a major challenge for the AU in this matter. Addis Ababa isn't just the physical location of the AU headquarters, it is the locus of its diplomatic activities.¹⁹⁸ AU members of staff and ambassadors share a close bond with their peers in the Ethiopian Ministry of Foreign Affairs, interacting and bonding at different fora.¹⁹⁹ While unspoken, and most likely to be dismissed as inconsequential, this puts some amount of political pressure on the AU to be nice to its host country.²⁰⁰ This pressure can also be interpreted in two contexts. To start with, its closeness to the Ethiopian government puts it in a complicated position, robbing it of the moral objectivity to advise the Abiy government on exercising restraint and demonstrating respect for provisions of the Constitutive Act, in its military operation against the TPLF. At the same time, this closeness ties its hands in taking any punitive action against its host or doing anything which will be viewed within Ethiopia as jeopardizing the political and military objectives of the Abiy government in its war against the TPLF. Clearly, an attempt by the AU to exercise its right of intervention in line with Article 4 (h), is certain to be viewed through such a lens.

The PSC Protocol provides that the AU should be in full command and control of ASF missions.²⁰¹ With its dilemma of being headquartered on the territory of a member-state, against whom it is expected to

196. See Fassil Hailu, *Ethiopia: Why Hasn't the African Union Intervened in Tigray*, AFRICA REPORT (July 30, 2021, 11:06 AM), <https://www.theafricareport.com/113662/ethiopia-why-hasnt-the-african-union-intervened-in-tigray/>.

197. See *Viewpoint: How Ethiopia is Undermining the African Union*, BBC NEWS (Nov. 29, 2020), <https://www.bbc.com/news/world-africa-55099908>.

198. Hailu, *supra* note 196.

199. *Id.*

200. Singh, *supra* note 81.

201. See *Resolving the African Standby Force's Identity Crisis*, INSTITUTE FOR SECURITY STUDIES PSC REPORT (July 22, 2022), <https://issafrica.org/pscreport/psc-insights/resolving-the-african-standby-forces-identity-crisis>.

command a mission, it remains to be seen how the AU can muster the courage required to spearhead such an ASF mission. The political influence of Ethiopia as the host country bore some fruit in the early part of 2021. While the ambivalence over intervention lasted, on March 9, 2021, the Ethiopian government brought a proposal asking for investigation into human rights violations in the Tigray region.²⁰² In the proposal, the Prime Minister Abiy Ahmed asked that the African Commission on Human and Peoples' Rights (ACHPR) in collaboration with the Ethiopian Human Rights Commission (EHRC) undertake this exercise.²⁰³ This proposal was later accepted by the AU Chairperson,²⁰⁴ a move that can be interpreted as the Ethiopian government calculatedly using its political leverage to profit from the AU's unwillingness to act.

Finally, despite the brilliant framework underpinning the right of intervention, in the case of the Tigray conflict, much of this has been rendered fruitless by the conundrum of regional politics, which has made it difficult to achieve unity and cohesion in the AU. For example, the Ethiopian government has both friends and enemies within the AU. The implication is that efforts towards intervention are likely to be wedged in between these two strongholds and frustrated by either side. For instance, Eritrea is involved in the current conflict, fighting alongside the Ethiopian Military.²⁰⁵ What this suggests is that the Eritrean government is more likely to act as a backer of the Ethiopian government within the AU system, making unanimity on intervention difficult. On the other hand, Egypt and Sudan are challenging Ethiopia's right over the Nile River, an issue tied to the Grand Ethiopian Renaissance Dam (GERD) project.²⁰⁶ Certainly, these two countries, aren't likely to be defenders of the Abiy government, but rather protagonists of intervention in the conflict, all to weaken the authority of the Ethiopian government.

V. SILENCING THE GUNS—TOWARDS A POLITICAL SOLUTION

The Ethiopia-Tigray conflict presents familiar difficulties associated with regional organizations fulfilling their legal mandate. It reveals how regional treaty law can become challenged and fail at the most critical times. The conflict is gradually going the way of most conflicts around the globe, manifesting the character of intractability. As things stand, the

202. Singh, *supra* note 81.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

possibility of the AU exercising its right of intervention appears slim, yet Africa cannot afford to let this conflict fester any longer, given the implication for the stability of the sub-region and the entire continent. From a geopolitical point of view, the longer resolution is delayed, the more the problems pile up. Importantly, the likelihood of further escalation as well as a spill over into the territory of neighboring countries must be kept in mind. Potentially, it could inflame transborder conflict amongst Ethiopia's neighbors such as Eritrea and Sudan.²⁰⁷ Of course, these countries themselves have been the epicenters of strife and conflicts at one point or another, such that they are still largely fragile and struggling contraptions. The high vulnerability of this conflict descending into a sort of regional conflagration and significantly destabilizing the Horn of Africa region therefore, necessitates a quick resolution by regional leaders.

At the core of the AU's terms of reference is the notion of "African solution to African problems," an idea captured in the Act as well as its amendment protocol.²⁰⁸ This idea, which is equally at the core of the organization's right of intervention, is driven by the understanding that Africans ought to be able to resolve their issues amongst themselves and by themselves.²⁰⁹ While the organization has been able to develop this idea in other areas, it has found it extremely challenging to craft "African Solutions" in the arena of peace and security on the continent.²¹⁰ Scholars have highlighted a number of problems besetting this idea. Mngomezulu, for instance, identifies very broad issues severely contending with the success of "African Solutions," such as disunity amongst African countries, stemming from entrenched colonial legacy of francophone and anglophone blocs; unnecessary competition at regional and sub-regional levels; the capacity and quality of African troops; and the national interests of AU member-states, towering above continental interest.²¹¹ Buttressing Mngomezulu's position, Apuuli notes that the crisis in Cote d'Ivoire and Libya exposed the emptiness in the mantra "African Solutions," as a lack of unity in the AU's ranks and the inability to mount

207. See *Ethiopia—Only African Solution Can Resolve Crisis*, NEW AFRICAN (Aug. 5, 2021), <https://newafricanmagazine.com/26534/>.

208. See Charles R. Majinge, *The Future of Peacekeeping in Africa and the Normative Role of the African Union*, 2 GOETTINGEN J. INT'L L. 414, 469 (2010).

209. *Id.*

210. *Id.*

211. See Bheki R. Mngomezulu, *Revisiting the Notion of African Solution to African Problems: Successes and Challenges*, 8 J. AFR. UNION STUD. 9, 18 (2019).

a united front, allowed outsiders like the UN to carry the day.²¹² Echoing Mngomezulu's point on "capacity and quality of African troops," Majinge states that the organization has largely struggled to mobilize resources to mount any meaningful challenge to the litany of conflicts on the conflict.²¹³

With the notion of "African Solutions" being more of a buzz word than a practical tool, it is important that a political solution of some sort is procured as soon as possible. Earlier in 2020, a move towards political solution was undertaken, when the then AU President and President of South Africa, Cyril Ramaphosa appointed three African leaders, i.e., erstwhile Presidents Ellen Johnson Sirleaf of Liberia, Joachim Chissano of Mozambique and Motlanthe Kgalema of South Africa, as special envoys, who arrived in the country to push for a peaceful resolution of the conflict.²¹⁴ Efforts by this group were rebuffed by the Ethiopian government, consequent upon which it declared its law enforcement operations.²¹⁵ The government also turned down a request to meet with TPLF leaders whom it labeled as criminals.²¹⁶ In August 2021, the AU Commission's Chairperson also appointed erstwhile Nigerian President, Olusegun Obasanjo, as the AU High Representative for the Horn of Africa.²¹⁷ Obasanjo met with Prime Minister Abiy, the TPLF's leader Debretsion Gebremichael, as well as leaders of the Afar and Amhara regions.²¹⁸ With respect to his work, Obasanjo has reported that at the base of the conflict are political issues requiring a political solution, including an unconditional ceasefire.²¹⁹ In March 2022, the Ethiopian government declared an indefinite humanitarian truce subsequent to which the TPLF later agreed to cessation of hostilities.²²⁰

With the resurgence in hostilities, it is clear that the continent cannot afford to allow this conflict to remain protracted. The likely catastrophe

212. See Kasajja P. Apuuli, *The African Union's Notion of "African Solutions to African Problems" and the Crises in Cote d'Ivoire (2010–2011) and Libya (2011)*, 12 AFR. J. CONF. RESOL. 135, 136 (2012).

213. Majinge, *supra* note 208, at 470.

214. BBC NEWS, *supra* note 197.

215. *Id.*

216. *Id.*

217. See Linda Mushoriwa, *The African Union's Role in Addressing the Scourge of Conflict in Africa*, ITALIAN INST. FOR INT'L POL. STUD. (June 22, 2022), <http://www.ispionline.it/en/publication/african-unions-role-addressing-scurge-conflict-africa-35200>.

218. See Adem K. Abebe, *A Blueprint for Peace in Ethiopia*, FOREIGN POL'Y (Nov. 12, 2021), <https://foreignpolicy.com/2021/11/12/ethiopia-peace-blueprint-tigray-conflict-resolution/>.

219. Mushoriwa, *supra* note 217.

220. *Id.*

is best imagined. With the shape of things, the warring parties are running against time, so significant hurdles must be crossed to get to a ceasefire.²²¹ While the TPLF wants the federal blockade which had prevented food and medical supplies from reaching Tigray ended and an end to the occupation of western Tigray by Amhara militias, the Abiy wants TPLF troops to withdraw from Afar and Amhara regions it captured and currently occupies.²²² The point can't be made that a political solution is the way to go, but this has to be methodically approached. To start with, the process must begin with a 'silencing of all guns,' which forms a part of Obasanjo's call for an unconditional ceasefire. Notwithstanding its shortcomings, the real value of the AU lies in its soft power and its ability to insist on norms of peace and to persuade leaders on the continent to toe this line.²²³

It is time to give expression to that value, and commit greater attention and resources in this area towards resolving the Tigray conflict. This Article argues that the process toward a political solution has to be on two levels, i.e., issues requiring urgent and immediate attention and those whose resolution can be undertaken through a long-term process. For the simpler issues, mediators must get Tigrayan leaders to recognize the authority of the Ethiopian government over the entire territory of the country, while the Abiy government must also be made to reciprocate this gesture, by removing the terrorist tag on the TPLF, restoring its federal subsidies, and allowing key services such as telecommunications, fuel supplies, banking, etc. to be restored to the Tigray region.²²⁴ It should also allow access to humanitarian actors and services.²²⁵ This will allow for a softening of the ground as well as securing the confidence and commitment of both sides to the process.

These initial concessions can then set the tone for broader negotiations over more complex issues such as sharing of political power, control of territories, etc. This phase of negotiations would require more than the effort of African leaders; rather, given its far-reaching nature, the international community must step in to get both sides to discuss and work out a framework acceptable to all sides.²²⁶ The U.S. and its allies must

221. See Aanu Adeoye, *Ethiopia's Tigray Conflict Demands International Attention. Time is Running Out*, TIME (Nov. 16, 2021), <https://foreignpolicy.com/2021/11/12/ethiopia-peace-blueprint-tigray-conflict-resolution/>.

222. *Id.*

223. BBC NEWS, *supra* note 197.

224. Abebe, *supra* note 218.

225. *Id.*

226. Adeoye, *supra* note 221.

also use their leverage as well as political and economic resources to persuade the Abiy government and the TPLF to come to the discussion table. At the same time, China, with its growing influence in the region must play a part. Ultimately, to secure some sort of agreement, there must be trade-offs. Whereas moves towards a political solution has demonstrable potency in resolving this conflict, momentum is critical in reaping the intended fruits. To this end, this article recommends that the current AU Chairperson Felix Antonie-Tshisekedi again convene a team of African leaders, toward securing the confidence and commitment of both parties to commence political negotiations as soon as practicable. This conference must begin by extracting an unconditional ceasefire from the two sides, so as to put an end to the carnage, and from that point, proceed with engaging the critical issues.

Before concluding this article, it is important to stress the point that in the long-term, the AU's right of intervention is in dire need of modernization, which would include identifying the rationale for the right in the first place, its normative purpose as well as the current obstacles besetting it. Strengthening the PSC is critical to the goal of 'silencing the guns' on the continent.²²⁷ There is equally a need to amend the PSC Protocol's requirement for membership, to reflect the peace and security mandate of the AU. This article, therefore, proposes that membership of the PSC should be limited to countries enjoying a measure of order and stability, especially those countries whose political leadership has taken concrete steps towards realizing peace domestically. This is instructive, as a country that isn't at peace is likely to lack the initiative, ability, and compassion, to pursue peace elsewhere.

Finally, the AU must be proactive in its response to crises on the continent. As noted by Mushoriwa, the AU must look for ways to root out the causes of armed conflicts, instead of simply reacting to them.²²⁸ It must challenge its members on issues such as governance deficit, and social inequality which underpin most domestic crises. For instance, as already noted in this article, the Tigray conflict is majorly rooted in Ethiopia's domestic, ethnic, and political contestation for power, with the current resort to violence merely a vehicle. While the TPLF had dominated the politics of Ethiopia for decades, the emergence of Abiy Ahmed in 2018 signaled the gradual decimation of the TPLF's political grip on the federation.²²⁹ For Abiy, the TPLF was the main opposition to the

227. *Resolving the African Standby Force's Identity Crisis*, *supra* note 201.

228. Mushoriwa, *supra* note 217.

229. See Asher Lubotsky & Habtom Mehari, *Is Ethiopia Collapsing? Implications for Israel and the Region from Tigray War*, 24 STRATEGIC ASSESSMENT 103, 104 (2021),

comprehensive reforms he had decided to undertake in the country.²³⁰ And so, his goal was to strengthen the central government in Addis Ababa, while weakening the TPLF's regional power.²³¹ On the side of the TPLF, Abiy's government was perceived not just as a challenge to its regional dominance, but as a threat to Ethiopia's unique ethnic federal system which guarantees the various ethnic groups with extensive autonomy.²³² In particular, the entire scenario was seen as trying to diminish the influence of the Tigrayan minority.²³³

VI. CONCLUDING OBSERVATIONS

This Article has examined the practical difficulties confronting the AU in exercising its right of intervention in Ethiopia's war in its Tigray region. It has also engaged issues such as the possibility of intervention on the basis of obligation to protect human rights, the challenge represented by the sovereignty of member-states, the AU's relationship with its host country, and the problem of regional politics. Additionally, the AU is hamstrung by personal problems such as shortcomings in its own legal framework, lack of financial resources, and a lack of political will to act. Within this cul-de-sac, there is a need for both a short-term as well as a long-term response, all toward a political solution.

This call is imperative given the large-scale humanitarian crisis which the conflict has generated; one that the UN has continued to call attention to, as well as making efforts to address. At its 8812th meeting, the UNSC called for an urgent resolution of the conflict,²³⁴ while the Under-Secretary for Political and Peacebuilding Affairs, Rosemary DiCarlo, addressing the same things as the UNSC, said, "*Ethiopia is at a critical juncture. Recent developments demonstrate the need to address issues plaguing the country in a comprehensive and sustainable way. The consequence of not doing so could be disastrous.*"²³⁵ Both the UN and AU are worried that the crisis may spread to other parts of the country, considering it is Africa's second most populous country, and destabilize the whole horn of Africa.²³⁶ In fact, the UN Secretary-General Antonio

<https://strategicassessment.inss.org.il/en/articles/is-ethiopia-collapsing-implications-for-israel-and-the-region-from-the-tigray-war/>.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. U.N. SCOR, 8812th Sess., U.N. Doc S/PV.8812 (July 2, 2021).

235. *Id.*

236. Drury & Wood, *supra* note 23.

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Guterres, has warned that the conflict must not escalate further, noting that, “*Ethiopia’s stability is important for the entire Horn of Africa region.*”²³⁷

Importantly, there is a need to repair the highly fractured Ethiopian federation. Without doubt, the current law enforcement action by the Ethiopian government and possibility of an AU right of intervention, are actions based on law. However, the reality is that societies, especially those that have been fractured by conflict, leading to excessive bloodletting, are hardly repaired simply through strict application of the law. Rather, total restoration mostly happens through organic political negotiations that accommodate the interests of all. It gives one great comfort to know that this is possible in the ongoing conflict, especially the fact that toeing this line has what it takes to bring closure to this crisis.

This Article has helped x-ray the Tigray conflict, examining existing as well as novel challenges confronting the AU’s right of intervention framework. It has also helped direct academic attention to these issues, with the expectation that future research would continue from this point, focusing on other aspects that this article couldn’t cover. It is worth stressing that the call for a political solution to this crisis isn’t misplaced. It is an established mantra that war is simply politics through other means. Amongst other options, it is only therefore reasonable that resolving any war must be pursued, largely deploying political tools.

237. See Mules, *supra* note 172.