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The African Great Lakes Pact and ius ad bellum

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Neighbourhood Watch? The African Great Lakes Pact and *ius ad bellum*

*Marco Roscini**

1. Introduction

It is a truism that Africa is the continent most plagued by armed conflicts and that the Great Lakes area (broadly defined)[1] is the most conflictual among the African sub-regions. The Great Lakes have also witnessed the most horrendous post-Cold War humanitarian disaster, the 1994 genocide in Rwanda, which shocked the conscience of the entire world and of Africans in particular. According to the International Panel of Eminent Personalities appointed by the Organization of African Unity (OAU), "the end of the genocide [...] was the opening of an entirely new chapter, almost as appalling as the first, but enveloping the entire Great Lakes Region in brutal conflict before becoming a war that has directly or indirectly involved governments and armies from every part of the continent".[2] The International Conference on the Great Lakes Region (ICGLR) was conceived in response to these events with the objective of transforming the tormented area into "a space of durable peace and security, of political and social stability, and of economic growth and shared development by multi-sector cooperation and integration".[3] The purpose, thus, was not just the abandonment of the aggressive use of armed force in the sub-region, but also the pursuit of economic development and the improvement of the living conditions of the populations.[4]

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[1] This article will refer to the Great Lakes Region as including the eleven core countries of the Great Lakes Pact.

[2] International Panel of Eminent Personalities, Rwanda: The Preventable Genocide, para. 20.1, available at <www.africa-union.org/Official_documents/reports/Report_rwanda_genocide.pdf>.

[3] Preamble, Pact on Security, Stability and Development in the Great Lakes Region, Nairobi, 14-15 December 2006. The text of the Pact, Protocols and Programmes of Action can be read at <www.lse.ac.uk/collections/law/projects/greatlakes/ihl-greatlakes-summary-new-docmt.htm> .

[4] M.R. Rupiya, Assessing the Stability Pact for the Great Lakes Region, 13 African Security Review (2004), 127.

In 1996, the process gained momentum after the outbreak of the armed conflict in the Democratic Republic of the Congo (DRC) and, in January 2000, the UN appointed a Special Representative to the Great Lakes Region with the task of supporting the efforts of holding a conference that would not only try to resolve existing conflicts but also provide a legal and political basis for preventing new ones. Canada and the Netherlands joined the process and formed and co-chaired the Group of Friends of the Great Lakes Region, that worked with the UN and the African Union (AU) and financially, technically and politically supported the efforts. The preparatory process of the Conference was officially launched when the national coordinators of the initial core countries (Tanzania, Kenya, Uganda, Rwanda, Burundi, DRC, Zambia) met for the first time in Nairobi on 23-24 June 2003 and identified four core areas for intervention: Peace and Security, Economic Development and Regional Integration, Democracy and Good Governance, and Humanitarian and Social Issues. The first Summit of the Heads of State and government of the participating countries took place in Dar-es-Salaam on 19-20 November 2004 and led to the signing of the Declaration on Peace, Democracy, Security and Development, which would constitute part and parcel of the final Pact. In February 2005 in Kigali, the participating States mandated thematic task forces to prepare action plans, programmes, projects and protocols on the four thematic areas in order to implement the Declaration.[5] The Pact on Security, Stability and Development in the Great Lakes Region, which, apart from the main treaty, also comprises the Dar-es-Salaam Declaration, ten Protocols, four Programmes of Action and a set of implementing mechanisms and institutions, was eventually signed at the second Summit in Nairobi (15 December 2006) by the now eleven core countries (Angola, Burundi, Central African Republic (CAR), Republic of Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia).[6] By ratifying the Pact, the member States agree to apply all its elements according to the principle of non-selectivity, as the Pact, Protocols and Programmes are complementary and mutually reinforcing (Article 31 (1) of the Pact): in particular, the Programmes of Action support the implementation of the Protocols, while the Pact provides the legally binding framework of the whole regime.[7] That is why the entry into force

[5] The Protocols were individually drafted before the Pact (C. Beyani, Introductory Note on the Pact on Security, Stability and Development in the Great Lakes Region, 46 (1) International Legal Materials (2007), 173).

[6] The Protocols are: the Protocol on the Protection and Assistance to Internally Displaced Persons; the Protocol on the Property Rights of Returning Persons; the Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all Forms of Discrimination; the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children; the Protocol on Democracy and Good Governance; the Protocol on Judicial Cooperation; the Protocol on Non-aggression and Mutual Defence in the Great Lakes Region; the Protocol on Management of Information and Communication; the Protocol Against the Illegal Exploitation of Natural Resources; and the Protocol on the Specific Reconstruction and Development Zone. The Programmes of Action focus on Peace and Security, Promotion of Democracy and Good Governance, Economic Development and Regional Integration, and Humanitarian and Social Issues.

[7] Accordingly, the Pact and its components do not allow reservations (Art. 31 (2) of the Pact).

of the Pact, which occurred on 21 June 2008 (i.e., thirty days after the receipt by the Conference Secretariat of the eighth instrument of ratification),[8] entailed the simultaneous entry into force of the Protocols. The Pact also sets up a sub-regional organization (the ICGLR) charged with the coordination and implementation of the Protocols and Programmes. The headquarters of the Secretariat are located in Bujumbura, Burundi.

This article will focus on the *ius ad bellum* provisions contained in the Protocol on Non-aggression and Mutual Defence (hereinafter "Great Lakes Protocol"), which forms an integral part of the Great Lakes Pact. This Protocol contains peculiar provisions that provide the opportunity to develop broader considerations on the alleged African unorthodox approach to the regulation of the use of armed force. Indeed, the Protocol cannot be considered in isolation and will thus be analyzed taking into account other analogous African treaties, with the ultimate purpose of establishing whether or not its provisions are consistent with existing law. The following section deals with the prohibition of aggression and compares the definition contained in the Great Lakes Protocol with that adopted by the UN General Assembly in 1974. Section 3 analyzes the right of individual and collective self-defence as contained in the Protocol and discusses its consistency with Article 51 of the UN Charter and customary international law. Finally, the last two sections investigate whether and under what conditions the Protocol provides for further exceptions to the prohibition of the use of force in addition to self-defence, in particular the "responsibility to protect" populations by military means and the right of pro-democratic intervention.

2. The Definition of Aggression

The Great Lakes Protocol has two natures: it is both a non-aggression and a mutual defence pact. As to the former aspect, one might wonder why the Great Lakes States decided to include the prohibition of aggression in a sub-regional treaty, considering that this prohibition is already well established under existing law and has even attained *ius cogens* status.[9] There are several reasons for this. First, the African Union (AU) encourages "the conclusion and ratification of non-aggression pacts between and among African States" and the harmonization of such agreements.[10] Second, the reaffirmation of the prohibition has a political value: it works

[8] Article 33 (1) of the Pact. In Res. 1823 (10 July 2008), the UN Security Council welcomed the entry into force of the Pact and stressed the importance of its full implementation.

[9] This is the opinion of R. Ago, Eighth Report on State Responsibility, ILC Yearbook (1980-II, pt. 1), 44; R. Müllerson, Jus ad bellum: Plus Ça Change (Le Monde) Plus C'Est la Même Chose (Le Droit)?, 7 Journal of Conflict and Security Law (2002), 169; and N. Ronzitti, Diritto internazionale dei conflitti armati, Torino 2006, 33.

[10] Chapter III, para. 13 (t) of the Solemn Declaration on a Common African Defence and Security Policy, adopted in Sirte by the Second Extraordinary Session of the AU Assembly (27-28 February 2004), available at <www.africa-union.org/Official_documents/Decisions_Declarations/Sirte/Declaration%20on%20a%20Comm.Af%20Def%20Sec.pdf>.

as a potent reminder in a region severely affected by interventionism and stigmatizes the wrongdoing States as "aggressors".[11] Finally, as will be seen, the drafters aimed to extend the prohibited conduct through the adoption of a definition of aggression which is much broader than the traditional one.

Article 5 of the Great Lakes Protocol provides that member States have a duty to refrain from acts of aggression, which are punishable also individually as international crimes against peace. The obligation is not limited to the relations among member States. Not only acts, but also threats of aggression and any propaganda related to such acts or threats are prohibited. Threats of aggression are not defined in the Great Lakes Protocol, but the 2005 AU Non-aggression and Common Defence Pact, which the Protocol under examination recalls in several instances, describes them as "any harmful conduct or statement by a State, group of States, organization of States, or non-State actor(s) which though falling short of a declaration of war, might lead to an act of aggression as defined above" (Article 1 (w)).[12]

But what exactly amounts to aggression? Article 5 (1) refers to Article 1 (2) and (3) of the Protocol itself, that contain a general definition of aggression and a list of situations amounting to aggression. At a closer look, however, the Protocol contains another definition of aggression in Article 5 (2), according to which "[a]ny use or threat of the use of force against the sovereignty, territorial integrity and political independence of a State, contrary to Article 4, or in any manner not authorized by the Charter of the United Nations and the Constitutive Act of the African Union, shall amount to an act of aggression". This definition is not identical to that contained in Article 1 (2) and its inclusion is difficult to make sense of. Be that as it may, for the purposes of the duty to refrain from acts and threats of aggression, Article 5 (1) expressly refers to the definition contained in Article 1, which will thus be analyzed in the following pages.

Article 1 (2) of the Great Lakes Protocol defines aggression as "the use, intentionally and knowingly, of armed force or any hostile act, as referred to in Article 1(3)(g to k), perpetrated by a State, a group of States, an organization of States or an armed group or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a Member State, contrary to the Constitutive Act of the African Union, the African Union Non-Aggression and Common Defence Pact or the Charter of the United Nations". This definition is modeled on that contained in Article 1 (c) of the AU Non-aggression and Common Defence Pact, which the Great Lakes Protocol reproduces almost verbatim. The AU definition, as to it, is inspired by the well-known Definition of Aggression adopted by the UN General Assembly in 1974.[13]

[11] Obviously, the UN Security Council would not be bound by such determination.

[12] On the definition of "threat of the use of force", see M. Roscini, Threats of Armed Force and Contemporary International Law, 54 Netherlands International Law Review (2007), 234-243.

[13] GA Res. 3314 (XXIX), 14 December 1974. Other African security treaties, e.g. the 1981 Economic Community of West African States (ECOWAS) Protocol Relating to Mutual Assistance in Defence (Art. 1), the 2000 Economic Community of Central African States (ECCAS) Mutual Assistance Pact (Art. 1) and the 2004 Central African Economic and Monetary Union (CEMAC) Non-aggression

Nevertheless, there are several important differences between the Great Lakes Protocol on the one hand and the General Assembly Definition on the other.[14] First of all, while according to Article 1 of the latter the use of force must be carried out by a State, the Great Lakes Protocol also includes acts perpetrated by "a group of States, an organization of States or an armed group or by any foreign or external entity".[15] Therefore, aggression can be perpetrated not only by States individually or collectively, but also by non-State actors.[16] This reflects the fact that militias and armed groups like the *Forces démocratiques de libération du Rwanda* (FDLR), Burundi's Palipehutu – *Forces nationales de libération* (FNL) and Uganda's Lord's Resistance Army (LRA) have thrived in the Great Lakes Region due to the incapacity of the governments to exercise effective control over certain parts of their territory and have threatened the stability of the individual Great Lakes States and of the region as a whole.[17] In fact, some regional conflicts, like the one in the DRC, have only marginally engaged regular forces and mainly involved insurgent groups, with different degrees of external support.[18]

Another difference is the fact that, in the Great Lakes Protocol, the use of armed force or other hostile acts must be directed against the sovereignty, political independence, territorial integrity *and* human security of the population of a member State, which seems to suggest that the criteria are cumulative and not alternative as in the 1974 Definition.[19] This is probably an oversight, that might however lead to

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Pact (Art. 1), contain definitions of aggression that reproduce almost verbatim Art. 1 of the General Assembly Definition. No definition appears in the 1978 ECOWAS Protocol on Non-aggression.

[14] A minor difference is the fact that, in the Great Lakes Protocol, the use of armed force or any other hostile act must be contrary not only to the UN Charter, but also to the AU Constitutive Act or the AU Non-aggression and Common Defence Pact. This is obviously due to the fact that the Great Lakes treaty regime inserts itself in the pan-African collective security and institutional framework. It is interesting, however, that this final part of the definition is not preceded by the disjunction "or" as in Art. 2 (4) of the UN Charter, which literally means that it is not a safety clause prohibiting all other acts inconsistent with the above mentioned treaties, but that the acts must be contrary to those treaties in order to amount to aggression. This might however be an oversight.

[15] It is to be noted that an explanatory note to Art. 1 of the 1974 Definition of Aggression provides that "the term 'State' […] [i]ncludes the concept of a 'group of States' where appropriate".

[16] "Armed groups" are defined in Art. 1 as "any armed group that do not belong to, or are not officially incorporated into, the defence and security forces of Member States". On *armed attacks* carried out by non-State actors, see below, Section 3.

[17] The Security Council has expressed concern and adopted sanctions against armed groups operating in the Great Lakes Region in several resolutions, e.g. Resolutions 1649 (21 December 2005) 1698 (31 July 2006), 1653 (27 January 2006), 1804 (13 March 2008), 1807 (31 March 2008), 1857 (22 December 2008).

[18] It appears that more than twenty armed groups have taken part in the conflict in the DRC after 1994, the main ones controlling over fifty per cent of the country's territory. See the Report on the situation of human rights in the Democratic Republic of the Congo submitted by the Special Rapporteur Roberto Garretón in accordance with Commission of Human Rights Resolution 2000/15, E/CN.4/2001/40 (1 February 2001), 13, 49, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/108/37/PDF/G0110837.pdf?OpenElement>.

[19] According to Art. 1 of the General Assembly Definition, "[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity *or* political independence of another State, or in

too restrictive interpretations. What is more interesting is that, like the AU Non-aggression and Common Defence Pact, the Great Lakes Protocol adds "human security of the population of a Member State" to the list of interests against which an aggression can be directed. "Human security" is not defined in the Protocol but is at the core of the Project on the Development of Border Zones and Promotion of Human Security, also part of the Great Lakes Pact. The concept of "human security" was first conceived in the United Nations Development Programme (UNDP)'s Human Development Report 1994 on "New Dimensions of Human Security".[20] The basic idea is that "there is no secure state with insecure people living in it".[21] If traditional security has been identified with defending the State against external threats, the new concept makes the individual the entity to be secured and recognizes that the greatest threats to security come from internal conflicts, diseases, hunger, environmental disasters, and not from inter-State wars. However, human security remains "a concept that has no clear theoretical grounding, scant political precedent, no consensus-commanding definition, and a highly uncertain future".[22] Two schools of thought have emerged. The broader view, adopted in the UNDP Report, links human security to development and environment and argues that the notion refers not only to "protection from sudden and hurtful disruptions in the patterns of daily life" such as violent threats or natural disasters, but also to safety from chronic threats like hunger, disease and repression ("freedom from fear and want").[23] This view is based on the assumption that hunger, diseases, environmental degradation kill more than wars and any realistic concept of "security" should take this fact into account. The proponents of the narrower view claim that such a broad approach renders the notion meaningless[24] and

any other manner inconsistent with the Charter of the United Nations, as set out in this Definition" (emphasis added).

[20] Read the Report at <http://hdr.undp.org/en/reports/global/hdr1994/chapters>.

[21] G. Oberleitner, Human Security: A Challenge to International Law?, 11 Global Governance (2005), 190.

[22] T. Owen, Human Security – Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition, 35 Security Dialogue (2004), 374. Not many legal commentators have engaged in the study of this notion (see, e.g., B. von Tigerstrom, Human Security and International Law: Prospects and Problems, Oxford 2008).

[23] UNDP Report, above note 20, 23. The UNDP lists seven non-exhaustive categories of threats to human security: economic security, food security, health security, environmental security, personal security, community security and political security (ibid., 24-25). The UN has embraced the notion of human security in the 2005 World Summit Outcome Document qualifying it as "freedom from fear and want", where "fear" refers to security and "want" to development, and has pledged to discuss and define it (GA Res. 60/1 (24 October 2005), para. 143). The concept also permeates the UN Secretary-General's 2000 Millennium Report (<www.un.org/millennium/sg/report/full.htm>), the UN Secretary-General's High-Level Panel on Threats, Challenges and Change's Report "A More Secure World: Our Shared Responsibility" (UN Doc. A/59/565 (2 December 2004)), and the 2005 Report "In Larger Freedom: Towards Development, Security and Human Rights for All" (UN Doc. A/59/2005, 21 March 2005).

[24] K. Krause, Is Human Security "More than Just a Good Idea?", in: M. Brzoska and P.J. Croll (eds.), Promoting Security: But How and for Whom?, Bonn International Center for Conversion (October 2004), 44 (<www.bicc.de/uploads/pdf/publications/briefs/brief30/brief30.pdf>). According to

suggest that human security should be limited to protection from violent threats ("freedom from fear") and should focus only on the human consequences of (especially internal) armed conflicts, State failure, repressive governments.[25] The Great Lakes Protocol does not expressly adopt either approach. However, the document by which it is largely inspired – the AU Non-aggression and Common Defence Pact – embraces the broader notion of "human security" by defining it as "the security of the individual in terms of satisfaction of his/her basic needs. It also includes the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development" (Article 1 (k)). The Solemn Declaration on a Common African Defence and Security Policy, adopted by the African Heads of State and government in Sirte on 28 February 2004, also specifies that human security is based "not only on political values but on social and economic imperatives as well"; therefore, a modern concept of security includes "human rights; the right to participate fully in the process of governance; the right to equal development as well as the right to have access to resources and the basic necessities of life; the right to protection against poverty; the right to conducive education and health conditions; the right to protection against marginalization on the basis of gender; protection against natural disasters, as well as ecological and environmental degradation".[26]

The reasons for this expansive approach to the concept of "human security" lie in the pathological weakness of the African State as an institution[27] and its incapacity to entirely control its territory, as well as in the pandemic corruption of the governing élites: focusing on traditional "State security" would often mean providing protection to greedy governments, criminals and warlords.[28] It is also to be noted that it is non-military threats to human security, such as scarcity and depletion of natural resources, that have fuelled most, if not all, African conflicts. None-

another commentator, "[i]f the term 'human security' embraces almost all forms of harm to individuals – from affronts to dignity to genocide – it loses any real descriptive power" (A. Mack, A Signifier of Shared Values, 35 Security Dialogue (2004), 367).

[25] See Mack, above note 24, 366-367, and, more broadly, Human Security Centre, The Human Security Report 2005: War and Peace in the 21st Century, New York-Oxford 2005.

[26] Chapter I, para. 6.

[27] It is well-known that the very notion of "State" was introduced to Africa by the Europeans and that many African States are the artificial creation of colonial powers and Cold War rivalry (J. Cilliers, Human Security in Africa – A Conceptual Framework for Review, African Human Security Initiative 2004, 20, available at <www.africanreview.org/docs/humsecjun04.pdf>).

[28] It has been argued that "[l]eaders, acting in the name of national security, have often directly posed profound threats to human security, or, as is the case in a number of African countries, simply abdicated their responsibility and used state security resources to pursue personal or partisan objectives" (Cilliers, above note 27, 39). The 2008 ECOWAS Conflict Prevention Framework makes clear that "the tensions between sovereignty and supranationality, and between regime security and human security, shall be progressively resolved in favor of supranationality and human security respectively" (Regulation MSC/REG.1/01/08, 16 January 2008, para. 4, available at <www.ecowas.int/publications/en/framework/ECPF_final.pdf>).

theless, including human security in the definition of aggression appears redundant and mainly emphatic. Indeed, it is difficult to see how the external uses of force and hostile acts listed in Article 1 (3) of the Great Lakes Protocol could be against human security without also being against the sovereignty, political independence and territorial integrity of the State where the population is located. Furthermore, although it has been argued that "human security is interventionist by nature",[29] the present author suggests that extreme caution should be used when extending a broad and indistinct concept to the rules on the use of armed force.

The Great Lakes Protocol's definition of aggression also incorporates a mental element: the wrongdoer must carry out the prohibited conduct "intentionally and knowingly". This subjective element does not expressly appear in Article 1 of the General Assembly Definition, but its relevance has been indirectly recognized in Article 2, where it states that, apart from the first use of armed force, the Security Council may take "other relevant circumstances" into account when determining the existence of an act of aggression.[30] The relevance of the mental element is supported by *Cassese*, who argues that "in the case of aggression, it would seem that a claimant State should prove that the State's officials that planned and unleased aggression had the *animus aggressionis*, that is, they intended to invade and conquer foreign territory, or destroy the foreign State apparatus, and so on".[31] The express reference to intent and knowledge in the Great Lakes Protocol's definition might be due to the fact that the Protocol also qualifies aggression as a crime against peace entailing individual criminal responsibility (Articles 3 (4) and 5 (3)). It is also to be noted that, in the General Assembly Definition, intent is only one of the circumstances that the Security Council can take into account when determining whether an act amounts to aggression: among other relevant circumstances is the fact that the acts concerned or their consequences are "of sufficient gravity" (Article 2). In the Great Lakes Protocol, this *de minimis* clause is not present.

Once again in contrast with the 1974 Definition, the Great Lakes Protocol's definition of aggression distinguishes two types of acts: uses of armed force and other hostile acts, listed in Article 1 (3) (a-f) and (g-k), respectively. It is not clear whether the list is exhaustive or not. Article 4 of the General Assembly Definition expressly states that further acts can be added: the absence of a similar clause in the Great Lakes Protocol suggests that the list contained therein is exhaustive. However, the fact that Article 5 (2) equates *any* use or threat of the use of force to an act of aggression seems to support the opposite view. Be that as it may, the first seven cases of aggression listed in Article 1 (3) (all the uses of force and the first type of hostile act) mirror their counterparts in the General Assembly Definition with pe-

[29] Oberleitner, above note 21, 194.

[30] Para. 2 was added as a compromise between those States maintaining that intent was an essential element of aggression and those who argued that only due regard had to be given to it, as the first use of armed force would suffice (J. Stone, Hopes and Loopholes in the 1974 Definition of Aggression, 71 AJIL (1977), 228-230).

[31] A. Cassese, International Law, Oxford 2005, 273.

ripheral differences and with the necessary cosmetic adaptations so to cover not only conduct by a State but also by non-State actors.[32] On the other hand, the definition of indirect aggression contained in Article 1 (3) (h) of the Great Lakes Protocol is much broader than its 1974 version, as it includes not only the sending of armed groups or mercenaries,[33] but also the provision of "any" support to them and to other organized transnational criminal groups "which might carry out hostile acts against a member State".[34] Several observations can be made on this point. First, "transnational criminal groups", as opposed to armed groups, bands, irregulars or mercenaries, seems to refer to groups pursuing not political, but rather financial or material benefits.[35] Second, the groups do not need to carry out acts of armed force against another State (as in the General Assembly Definition), but more generic "hostile acts". In fact, it is not even necessary that these groups actually commit hostile acts for their sending or support to amount to aggression, being sufficient that they "might" do so. Furthermore, the gravity of these (potential) acts has to be comparable, but does not necessarily have to amount (as required by the 1974 Definition and the AU Non-aggression and Common Defence Pact), to the previously listed acts of aggression.

Finally, the last three cases of hostile acts amounting to acts of aggression listed in the Great Lakes Protocol do not appear in the 1974 Definition, although they are present in the AU Non-aggression and Common Defence Pact: "[a]cts of espionage which could be used, contrary to Article 7 (4), for military aggression against a Member State"; "[t]echnological assistance of any kind, intelligence and training given to another State for use, contrary to Article 7 (4), with the aim of committing acts of aggression against another Member State"; and "[t]he encour-

[32] The only acts of aggression that can be committed by a State only and not also by non-State actors are 1) the attack on the land, sea or air forces or marine and air fleets of a member State, and 2) the use of armed forces which are within the territory of another member State with the agreement of the latter in contravention of the conditions provided in the AU Non-aggression and Common Defence Pact (Art. 1 (3) (e) and (f)). It is to be noted that the latter situation refers to the AU Non-aggression and Common Defence Pact, and not to any agreement that member States might conclude for the stationing of their armed forces on each other's territory. Art. 1 (3) (a) corresponds to the general, narrower definition contained in Art. 1 of the 1974 General Assembly Definition, which therefore is just an example of the broader notion of aggression adopted in the Great Lakes Protocol.

[33] During the negotiations that led to the General Assembly Definition, some States unsuccessfully supported the inclusion not only of "sending" but also of other forms of support (Stone, above note 30, 238).

[34] This provision is reinforced by Art. 8 of the Protocol, in particular by paras. (2) and (3), according to which the States parties commit themselves to prohibit armed groups from using their territories as a base for committing, inter alia, acts of aggression against other member States and not to give any help "directly or indirectly, actively or passively" to armed groups operating against other member States.

[35] Art. 1 (x) of the AU Non-aggression and Common Defence Pact defines a "trans-national organized criminal group" as a "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes which are trans-national in scope, or offences established in accordance with international law, including the United Nations Convention Against Trans-national Organized Crime and its Protocols thereto, the purpose being which to obtain, directly or indirectly financial and other material benefits".

agement, support, harboring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State".[36] The decision to include these situations, which do not involve an attack, is questionable, as they technically amount to preparatory conduct or threats, and not to *acts* of aggression.

It is to be pointed out that the States parties to the Great Lakes Protocol undertake not only not to commit acts or threats of aggression, but also more broadly reaffirm their obligation "to renounce any resort to the threat or use of force as policies, or instrument of settling any differences, disputes, or the pursuit of national objectives" (Article 3 (1)) and not to intervene in the internal affairs of other States (Article 4 (2)).[37] The prohibition of the use of force is repeated in Article 4 (1), with a language closer to that of Article 2 (4) of the UN Charter.[38] The only differences are that the inconsistency of the threat or use of force is referred not only to the Purposes of the United Nations but to the Charter as a whole[39] and also to the "Constitutive Act of the African Union, the relevant resolutions of the Security Council of the United Nations and the African Union Peace and Security Council". The renunciation of the threat and use of force is "without prejudice to the primary responsibility of Member States to preserve the integrity of their sovereignty and to protect the lives and human rights of all persons and all peoples, including women and children, residing within their territories" (Article 3 (2)). This redundant clause could be interpreted as an emphatic reaffirmation of the right to self-defence, with a language updated in order to include the "responsibility to protect".[40]

Article 4 (5) includes, among the examples of violations of the principle of non-intervention *and* of the prohibition of the use of force, the provision of "direct or indirect support *whatsoever* to armed groups engaged in armed conflict, violence,

[36] Art. 1 (3) (i), (j) and (k) of the Great Lakes Protocol.

[37] Art. 7 (6) (e) of the Great Lakes Protocol also reaffirms the "duty to refrain, subject to the right of individual or collective self-defence, from the threat or use of force in violation of the existing international borders of another State to resolve any disputes, particularly territorial disputes and frontier incidents".

[38] It is interesting to note that the corresponding provision in the 1978 ECOWAS Protocol on Non-aggression is broader, as it prohibits not only threat and use of force and aggression, but also the employment of "any other means inconsistent with the Charters of the United Nations and the Organization of African Unity against the territorial integrity or political independence of other Member States" (Art. 1).

[39] See, similarly, Art. 3 (a) of the AU Non-aggression and Common Defence Pact and Art. 1 of the ECOWAS Protocol on Non-aggression. On the contrary, Art. 3 (2) of the 2003 Southern African Development Community (SADC)'s Mutual Defence Pact refers the inconsistency of the use or threat of force to the *Principles* of the UN Charter only. The reference to the Charter as a whole would entail that a use of force, to be lawful, has to comply also with the Charter procedures (B. B. Ferencz, A Proposed Definition of Aggression: By Compromise and Consensus, 22 International and Comparative Law Quarterly (1973), 416).

[40] See below, Section 4.

and/or, the unconstitutional overthrow of a Government of another State".[41] The insistence of the Protocol on the prohibition of any assistance to armed groups is easily explained: many African armed rebellions would not have occurred without external provision of arms and supplies, made possible by the permeability of uncontrolled borders.[42] However, the Protocol is in sharp contrast with the conclusions of the ICJ in the *Nicaragua* case, where it held that not all forms of assistance given by a State to armed groups amount to a use of force, although they may constitute an unlawful intervention in the internal affairs of another State.[43] The Court also made clear that "the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any way contrary to international law":[44] from the perspective of the Great Lakes Protocol, though, even this form of assistance would be prohibited.

3. Self-Defence Issues

The Great Lakes Protocol is not only a non-aggression pact, but also provides for mutual defence.[45] Article 6 (1) reaffirms the inherent right of individual and collective self-defence of the member States in the event of an armed attack "according to Article 51 of the Charter of the United Nations". An armed attack against one or more member States "shall be considered an attack against them all" and consequently each of them "will assist the State or States so attacked by taking forthwith, individually or in concert with the other Member States, such action as it deems necessary, including the use of armed force, to restore and maintain the peace, security, stability, and development of the Great Lakes Region" (Article 6 (3)). By correctly limiting the right of self-defence to the occurrence of an "armed attack", the Great Lakes Protocol differs from the AU Non-aggression and Common Defence Pact, that controversially links individual and collective self-defence "by all available means" to the broader notion of "aggression" (defined in Article 1

[41] Emphasis added. The Great Lakes States undertake not only not to support armed groups, but also to adopt the measures indicated in Art. 8. Failure to do so entails that a member State can be held responsible by other member States or called to account before the Summit of the Conference (Art. 8 (11)).

[42] Cilliers, above note 27, 24. It is therefore not surprising that Art. 7 of the Protocol, as well as one of the Sub-Programmes for Action, focus on security management of common borders.

[43] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US),* Merits, Judgment of 27 June 1986, ICJ Reports (1986), para. 228.

[44] *Nicaragua*, above note 43, para. 242.

[45] Several mutual defence pacts have been concluded at the African regional and sub-regional levels, including the 2005 AU Non-aggression and Common Defence Pact, the 1989 Treaty creating the Union of the Arab Maghreb (Art. 14), the 2003 SADC Mutual Defence Pact, the 1981 ECOWAS Protocol Relating to Mutual Assistance in Defence, the 2000 ECCAS Pact of Mutual Assistance, the 2004 CEMAC Pact of Non-aggression, Solidarity and Mutual Assistance.

(c) as expansively as in Article 1 of the Great Lakes Protocol)[46] and even "threat of aggression" (Article 4 (b)): the consistency of the AU Pact with the UN Charter and with customary international law can thus be seriously doubted.

The Great Lakes Protocol prescribes procedural obligations for the exercise of individual self-defence, i.e. the prior determination by the attacked State that its territory has been subject to an armed attack and the notification of the attack to the other member States, the AU Peace and Security Council and the UN Security Council (Article 6 (2)).[47] Needless to say, non-compliance with these procedural obligations would not deprive the victim State of its right to individual self-defence, which ultimately rests on the UN Charter and on customary international law. Nothing is said with regard to procedural obligations for the exercise of collective self-defence.[48]

According to the Great Lakes Protocol, an armed attack can be committed not only by a State, but by non-State actors as well: Article 5 (4) provides that "Member States shall counter acts of aggression committed against anyone of them by armed groups, taking into account the provisions of Articles 6 [on self-defence] and 8", while Article 8 (2) expressly refers to "armed groups [...] carrying out armed attacks".[49] Article 51 of the UN Charter is silent on this point, but, in its Advisory Opinion on the *Legal consequences of the construction of a Wall in the Occupied Palestinian Territory*, the ICJ interpreted it as referring only to "the case

[46] See above, Section 2. It is usually believed that "aggression" is broader than "armed attack": see J. Combacau, The Exception of Self-Defence in the United Nations Practice, in: A. Cassese, The Current Regulation of the Use of Force, Dordrecht-Boston-Lancaster 1986, 22; P. Lamberti Zanardi, Indirect Military Aggression, ibid., 114; Y. Dinstein, War, Aggression and Self-Defence, Cambridge 2005, 184; T.D. Gill, The Law of Armed Attack in the Context of the *Nicaragua* Case, 1 Hague Yearbook of International Law (1988), 36; A. Randelzhofer, Article 51, in: B. Simma et al. (eds.), The Charter of the United Nations: A Commentary, Oxford 2002, Vol. 2, 795; E. Sciso, L'aggressione indiretta nella definizione dell'Assemblea generale delle Nazioni Unite, 66 Rivista di diritto internazionale (1983), 272-275. Art. 6 of the 1947 Inter-American Treaty of Reciprocal Assistance (Rio Treaty) expressly contemplates a case of "aggression which is not an armed attack", that gives rise only to the obligation to consult. Examples of acts of aggression not amounting to an armed attack are those listed in Art. 3 (c), (e), (f) of the General Assembly Definition of Aggression (Gill, above note 46, 32-33; Sciso, above note 46, 275). Contra, see S.A. Alexandrov, Self-Defence Against the Use of Force in International Law, The Hague-London-Boston 1996, 114; B. Broms, The Definition of Aggression, 154 Recueil des cours de l'Académie de droit international de La Haye (1977-I), 370.

[47] Article 51 only requires States to immediately report to the Security Council the measures taken in self-defence, not to notify the armed attack. Art. 6 (4) of the SADC Mutual Defence Pact requires that the measures taken in response to an armed attack, along with the armed attack itself, "shall immediately be reported to the Peace and Security Council of the African Union and the Security Council of the United Nations". See also Art. 11 (4) (e) of the SADC Protocol on Politics, Defence and Security Co-operation.

[48] In *Nicaragua*, the ICJ made clear that the exercise of the right of collective self-defence requires the declaration by the victim State that it has been the object of an armed attack and its request to a third State for intervention (above note 43, paras. 195, 199). See also Case concerning *Oil Platforms (Iran v. United States)*, Merits, Judgment of 6 November 2003, para. 51.

[49] The AU Non-aggression and Common Defence Pact also refers to aggression by non-State actors, triggering the right of individual and collective self-defence (Arts. 1 (c), 4 (b)).

of armed attack by one State against another State".[50] The majority opinion has however been criticized by the minority judges, including Judges Higgins, Kooijmans and Buergenthal.[51] In *DRC v. Uganda*, the ICJ was more cautious and, although it held that, as the attacks carried out by rebel groups against Uganda were non-attributable to the DRC, "the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present", it concluded that "the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces".[52] Recent practice seems to show growing support for the right of self-defence against armed attacks by non-State actors.[53] The Security Council reaffirmed the inherent right of individual and collective self-defence of the United States with regard to the 11 September 2001 attacks by Al-Qaeda.[54] The NATO and Rio Treaty machineries for collective self-defence were also activated in reaction to those attacks.[55] In the 2006 operations against Hezbollah militias based in southern Lebanon, most States recognized that Israel had the right of self-defence against their attacks, although some questioned the proportionality of the reaction. [56] Similarly, in February 2008 the international community did not condemn Turkey's military operation in northern Iraq in order to destroy the Kurdish Worker's Party (PKK) bases, even if the armed group's actions were not supported by or imputable to Iraq.[57] Hence,

[50] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 139.

[51] According to Judge Higgins, "nothing in the text of Article 51 [...] stipulates that self-defence is available only when an armed attack is made by a State" (*Legality of the Wall*, above note 50, Separate Opinion of Judge Higgins, para. 33). See also Judge Kooijmans's Separate Opinion, para. 35 and Judge Buergenthal's Declaration, para. 6 (ibid.).

[52] *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, para. 147. Judge Kooijmans and Judge Simma, however, argued that armed attacks carried out by non-State actors which are of sufficient scale and effect entitle to self-defence whether or not they can be attributed to the territorial State (Separate Opinion of Judge Kooijmans, paras. 29-32; Separate Opinion of Judge Simma, para. 12). A commentator has maintained that the ICJ decisions in the *Nicaragua* and *DRC v. Uganda* cases "should not be understood as ruling out the legitimate use of defensive force against non-State actors unless the armed attacks of such non-State actors are attributable to a State. Instead, the Court's decisions should be understood as requiring that armed attacks be attributable to a State if the State *itself* is to be the subject of defensive uses of force" (K.N. Trapp, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Actors, 56 International and Comparative Law Quarterly (2007), 145).

[53] It could be noted than some less recent practice seems to support this view as well: after all, the *Caroline* incident (the *locus classicus* of the law of self-defence) involved a reaction against non-State actors (see the facts in R.Y. Jennings, The *Caroline* and McLeod Cases, 32 AJIL (1938), 82-88, 92).

[54] SC Resolutions 1368 (12 September 2001) and 1373 (28 September 2001).

[55] N. Ronzitti, The Expanding Law of Self-Defence, 11 Journal of Conflict and Security Law (2006), 348.

[56] Trapp, above note 52, 154-155.

[57] R. van Steenberghe, Le Pacte de non-agression et de défense commune de l'Union Africaine: entre unilatéralisme et responsabilité collective, 113 Revue générale de droit international public (2009), 139. The Turkish Prime Minister Erdogan claimed that "[t]he cross-border operation is a result of

from this point of view, the Great Lakes Protocol's version of the right of self-defence is not *contra*, but rather *præter legem*: as Gill points out, "[i]t is not so much *who* is carrying out the use of force, but *what* the scale and effects of such an operation are – which is important in determining whether the operation constitutes an 'armed attack'".[58] In the context of the Great Lakes Protocol, the adoption of this interpretation can be explained in the light of the disfavor towards armed groups that permeates the entire Pact.[59]

On the contrary, the specification in Article 6 (3) that the individual or collective defensive action must aim "to restore and maintain the peace, security, stability, and development of the Great Lakes Region" is highly problematic. This provision echoes the language of Article 1 (2) of the 2003 SADC Mutual Defence Pact, where it states that "collective self-defence" means "the measures undertaken collectively by the States Parties to ensure peace, stability and security in the Region". Now, the purpose of self-defence is limited to avert an armed attack and does not extend to the maintenance of peace and security (which is the purpose of collective security) or even stability and development. As the ICJ held in *Nicaragua*, under customary international law self-defence only warrants "measures which are proportional to the armed attack and necessary to respond to it".[60] A broader freedom of action might easily be used to justify illegal interventions and regime change as the result of an initially defensive action, something that existing law clearly does not allow.[61] To the extent that Article 6 (3) purports to allow armed actions to restore peace, security, stability and development without Security Council authorization, it is incompatible with Articles 2 (4) and 53 of the UN Charter, which would prevail ex-Article 10 (3) of the Protocol.[62]

There is also another problem. Under Article 8 of the Great Lakes Protocol, States parties commit themselves to apprehend, intercept and disarm members of armed groups that are using or attempting to use their territory, far from the border, to prepare or conduct armed attacks or subversive activities against other States (Article 8 (4)) or that are fleeing across their common borders (Article 8 (5)).

Turkey's right to self-defence" (Iraq Demands that Turkey Withdraw its Troops, Times On Line, 26 February 2008, <www.timesonline.co.uk/tol/news/world/iraq/article3439329.ece>).

[58] Gill, above note 46, 50.

[59] The provisions on collective self-defence against attacks by non-State actors appear to have been put into practice in December 2008, when Sudan, Uganda and the DRC launched a joint operation against the Lord's Resistance Army in the northeastern DRC, and in January-February 2009, when the DRC and Rwanda conducted joint military operations against the FDLR and the ex-Far/Interahamwe in the eastern DRC.

[60] *Nicaragua*, above note 43, para. 176. See also *Oil Platforms*, above note 48, paras. 51, 76.

[61] See Ronzitti, above note 55, 352-353, who however concedes that "actions in self-defence and actions aimed at restoring peace and security are becoming ever more blurred".

[62] Art. 10 (3) provides that "[n]othing contained in this Protocol shall be construed to be contrary to the provisions of the Pact, the Constitutive Act of the African Union, and the Charter of the United Nations". Art. 30 (2) of the 1969 Vienna Convention on the Law of Treaties makes clear that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail".

Accordingly, a member State engaged in the "hot pursuit" of members of an armed group has first to inform and notify the member State towards which the armed groups are fleeing and request it to intercept, apprehend and disarm them (Article 8 (6)). If the member State is "unwilling or unable to intercept armed groups in flight or operating on its territory", it will be "encouraged" to enter into bilateral agreements specifying "the conditions under which the armed forces of another Member State may undertake the hot pursuit of the said armed groups" (Article 8 (7)). So far so good. Nevertheless, Article 8 (10) specifies that none of the above provisions "shall affect the right of individual or collective self-defence in the event of an armed attack, *or* the failure, after notification or request, to intercept and disarm members of an armed group pursued by the defence and security forces of a Member State".[63] Therefore, the Protocol introduces a second situation that triggers the right of self-defence in addition to the occurrence of an armed attack, i.e. "failure, after notification or request, to intercept and disarm members of an armed group pursued by the defence and security forces of a Member State".[64] This situation seems to refer only to the case of "hot pursuit" on land, i.e. "the uninterrupted continuation into a no man's land or into the territory of another State [...] of the pursuit of an offender or a group of offenders started by the authorities immediately after the commission of an offence",[65] and not to the different Lebanon-like scenario where the armed group permanently operates against a State from the territory of another country and there is no "following the tail"[66] of fugitives but rather a reaction to attacks originating from across the border.[67] The doctrine of hot pursuit on land was most famously invoked by the racist regimes of South Africa and Rhodesia to justify their incursions in neighbouring countries.[68] However,

[63] Emphasis added.

[64] The situation would of course be different if the armed group had been "sent" by the State where they seek refuge, as this amounts to an armed attack by that State, at least when the armed group's operation "because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces" (*Nicaragua*, above note 43, para. 195; see also *DRC v. Uganda*, above note 52, para. 146). In fact, in this case the members of the armed group are de facto agents of the sending State (Lamberti Zanardi, above note 46, 112; Randelzhofer, above note 46, 800-801; Sciso, above note 46, 259).

[65] N.M. Poulantzas, The Right of Hot Pursuit in International Law, The Hague-London-New York 2002, 11.

[66] L. Beehner, Can States Invoke "Hot Pursuit" to Hunt Rebels?, Council on Foreign Relations, 7 June 2007, <www.cfr.org/publication/13440> (quoting Michael P. Scharf).

[67] This is supported by a literal interpretation of Art. 8 (10), that refers to "pursued" members of an armed group. Furthermore, like Art. 8 (5), Art. 8 (10) mentions "to intercept and disarm" the members of the armed group, while Art. 8 (4) refers to "apprehend and disarm, far from their common borders".

[68] C. Gray, International Law and the Use of Force, Oxford 2008, 137-138. South Africa eventually abandoned this justification. More recently in Africa, Chad has repeatedly claimed its right to pursue rebels into Sudan ("Chadian Army Chases Rebels in Sudan, Aid Groups Prepare to Pull Some Staff from Border Town", USA Today, 15 December 2006, (<www.usatoday.com/news/world/2006-12-15-chad-sudan_x.htm>), "Cross-Border Clashes Between Chad and the Sudan", Press release, 10 April 2007, <www.usau.usmission.gov/chad-sudan-clash.html>; "Chad tells UN will carry out hot pursuit of rebels", Reuters, 1 February 2008, available at <www.reuters.com/article/latestCrisis/

the UN Charter does not provide for this exception to the prohibition of the use of force and the existence of such a right under customary international law has always been questioned: *Brownlie* for instance recalls that "[i]t is doubtful if any right of hot pursuit can be justified by reference to *The Caroline* doctrine, and the State practice hardly supports it as a customary right. Claims to the right are exceptional; numerous treaty provisions assume that no such right exists; and in several disputes where it would have been open to one of the parties to allege such a right, no claim was made. Works of authority make no reference to it, with the exception of works devoted to United States practice".[69] It is true that some (but not many) precedents where States invoked the doctrine of hot pursuit on land do exist, but they do not seem to be supported by the necessary *opinio juris*.[70] Indeed, practice in relation to the US incursions into Mexico in pursuit of Francisco Villa's bands, France's pursuit of members of Algeria's *Front de Libération Nationale* into Morocco and Tunisia, and South Vietnam and United States' trespassing into Cambodia to pursue the Vietcong shows that the pursuing States expressly or implicitly recognized that hot pursuit on land is a violation of the sovereignty of the State whose border is trespassed unless this has authorized the incursion or an agreement allowing it has been concluded.[71] In particular, it is significant that, after initially invoking it, France subsequently rejected the doctrine of hot pursuit as a possible legal justification for its incursions into Morocco and Tunisia.[72] Also, in Resolution 568 of 21 June 1985, the Security Council clearly denounced and rejected the above mentioned "racist South Africa's practice of 'hot pursuit' to terrorize and destabilize Botswana and other countries in southern Africa". More recently, Iraq rejected Turkey's request to be allowed to cross the border in pursuit of the PKK (September 2007): the Turkish request and the Iraqi rejection clearly show that neither country believed that a customary right of hot pursuit exists.[73]

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idUSN01424661>; "Chad carried out new air raid in Darfur – Sudan", Sudan Tribune, 16 July 2009, <www.sudantribune.com/spip.php?article31836>). "Hot pursuit" operations have also been carried out by Ethiopia into Somalia ("Ethiopia troops 'back in Somalia'", BBC, 19 May 2009, available at <http://news.bbc.co.uk/1/hi/world/africa/8057115.stm>) and Kenya (C. Mwaûra, G. Baechler, B. Kiplagat, Background to Conflicts in the IGAD Region, in: C. Mwaûra and S. Schmeidl (eds.), Early Warning and Conflict Management in the Horn of Africa, Lawrenceville, NJ 2002, 40).

[69] I. Brownlie, International Law and the Activities of Armed Bands, 7 International and Comparative Law Quarterly (1958), 734. Wooldridge also denies the existence of a right of hot pursuit on land under customary international law (F. Wooldridge, Hot Pursuit, Max Planck Encyclopedia of Public International Law, Vol. 2 (1999), 882). See similarly J. Charpentier, Existe-t-il un droit de suite?, 65 Revue générale de droit international public (1961), 307-309; M. Giuliano, T. Scovazzi, T. Treves, Diritto internazionale, Milano 1983, Vol. 2, 535-536; Poulantzas, above note 65, 11-12.

[70] See the detailed examination of State practice undertaken by Poulantzas, above note 65, 13-35.

[71] F. Pocar, L'esercizio non autorizzato del potere statale in territorio straniero, Padova 1974, 30-37.

[72] Charpentier, above note 69, 302-305. According to the French Prime Minister Debré, "[l]e droit de suite, ou de poursuite, n'est défini par le droit international que dans le cadre d'accords conclus entre les Etats limitrophes intéressés" (quoted ibid., 304).

[73] Keesing's Record of World Events (2007), 48151. The 1984 Security Protocol concluded by Turkey and Iraq allowed the parties to enter each other's territory to a maximum depth of five kilometres

Many States condemned the March 2008 Colombian cross-border raid into Ecuador in what was (incorrectly) labeled by Colombian President Uribe a "hot pursuit" mission against *Fuerzas Armadas Revolucionarias de Colombia* (FARC) rebels,[74] and the Organization of American States (OAS)'s Permanent Council qualified it as a "violation of the sovereignty and territorial integrity of Ecuador and of principles of international law".[75] In June 2008, Pakistan also strongly protested against the US hot pursuit air attacks against militants who had fled into Pakistan after an ambush on the Afghan side of the border.[76] As to the possible justification of "hot pursuit" as a self-defence action, apart from the ontological differences between the two notions,[77] in *DRC v. Uganda* the ICJ made clear that "Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down [i.e., in the case of the occurrence of an armed attack]. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in par-

without the need for ad hoc consent to the incursion (F. Keskin, Turkey's Trans-Border Operations in Northern Iraq: Before and After the Invasion of Iraq, 8 Research Journal of International Studies (November 2008), 63). The Protocol was however not renewed in 1989. Although its legal justifications for the incursions have often been vague, it appears that, until 1991, Turkey relied on the hot pursuit doctrine (ibid., 62, 64). On the other hand, Iran, which also carried out cross-border operations into Iraq against Kurdish terrorist groups, consistently relied on self-defence (C. Gray and S. Olleson, The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds, 12 Finnish Yearbook of International Law (2001), 407). For Turkey's post-2003 incursions into Iraq, see Gray, above note 68, 142-143.

[74] L.E. Nagle, Colombia's Incursion into Ecuadorian Territory: Justified Hot Pursuit or Pugnacious Error?, 17 Journal of Transnational Law and Policy (2007-2008), 360. In reality, the operation was not a case of hot pursuit, but rather a case of an armed group based in the territory of a neighbouring country and permanently operating from there: indeed, no pursuit of FARC rebels had started in Colombian territory before penetrating into Ecuador (see the chronology of the events in F.M. Walsh, Rethinking the Legality of Colombia's Attacks on the FARC in Ecuador: A New Paradigm for Balancing Territorial Integrity, Self-Defense and the Duties of Sovereignty, 21 Pace International Law Review (2009), 137-138). For the reactions to the operation, see Th. Christakis, The Legality of Cross-Border Military Operations to Hunt Down Rebels, Interest Group on Peace and Security, <http://igps.wordpress.com/discussions/the-legality-of-cross-border-military-operations-to-hunt-down-rebels>.

[75] CP/RES. 930 (1632/08), 5 March 2008. See also the Resolution of the 25th Meeting of Consultation of the OAS Ministers of Foreign Affairs adopted on 17 March 2008 (RC.25/RES.1/08).

[76] "Pakistan Fury over US 'Hot Pursuit' Attacks", CNN, 11 June 2008, <www.cnn.com/2008/WORLD/asiapcf/06/11/pakistan.troops.killed/index.html>. From a classified 2005 document, it appears that the US forces in Iraq were also authorized to pursue former members of the Saddam Hussein's government and suspected terrorists across the border into Iran and Syria (E. Schmitt and M.R. Gordon, Leak on Cross-Border Chases from Iraq, The New York Times, 4 February 2008, <www.nytimes.com/2008/02/04/washington/04rules.html>).

[77] A commentator has noted that "the objective of the right of self-defence is the repulse of aggression or simply of an armed attack and the protection of the territorial integrity or political independence of a State. On the other hand, the main objective of the right of hot pursuit is the effective administration of justice of an injured State and the bringing before its courts and punishment of wrongdoers" (Poulantzas, above note 65, 16).

ticular, recourse to the Security Council".[78] It is therefore doubtful that Article 8 (10) of the Great Lakes Protocol is compatible with the UN Charter and customary international law where it allows armed incursions in hot pursuit into the territory of another State even if the bilateral agreements mentioned in Article 8 (7) have not been concluded between the concerned States. The primacy of the Charter is guaranteed by Article 10 (3) of the Great Lakes Protocol and by Article 103 of the Charter itself, and thus "no right or claim incompatible with Charter obligations may be invoked by the parties".[79]

4. The "Responsibility to Protect"

Even though it has been claimed that it is not a real innovation but simply a restatement, with new terminology, of well-known concepts,[80] it is usually believed that the notion of "responsibility to protect" was conceived by the International Commission on Intervention and State Sovereignty (ICISS) in 2001 as a human security initiative[81] and was later endorsed in other documents, such as the UN High-Level Panel on Threats, Challenges and Change's Report "A More Secure World",[82] the UN Secretary-General's Report "In Larger Freedom",[83] and the 2005 World Summit Outcome Document.[84] All the above mentioned texts rest on the idea that State sovereignty implies responsibility. In particular, States have the

[78] *DRC v. Uganda*, above note 52, para. 148. It has however been noted that "[i]t seems unrealistic that a State facing attacks from insurgents operating out of the territory of a dysfunctional State has no remedies in the international system" (P.N. Okowa, Congo's War: The Legal Dimension of a Protracted Conflict, 77 British Year Book of International Law (2006), 249).

[79] R. Bernhardt, Article 103, in Simma et al., above note 46, 1297.

[80] L. Boisson de Chazournes and L. Condorelli, De la "responsabilité de protéger", ou d'une nouvelle parure pour une notion déjà bien établie, 110 Revue générale de droit international public (2006), 11-18. See for instance Art. 1 common to the 1949 Geneva Conventions on the protection of the victims of war. See also the considerations of the ICJ in the *Palestine Wall* Advisory Opinion, above note 50, paras. 154-160.

[81] International Commission on Intervention and State Sovereignty, "The Responsibility to Protect" (2001), available at <www.iciss.ca/report-en.asp>.

[82] Above note 23.

[83] Above note 23.

[84] Above note 23. The Security Council also referred to the responsibility to protect in Res. 1674 (28 April 2006) on the protection of civilians in armed conflict and in Res. 1706 (31 August 2006) on Darfur. On 21 February 2008, the UN Secretary-General appointed Edward C. Luck as Special Adviser on the Responsibility to Protect and on 12 January 2009 presented a Report on "Implementing the Responsibility to Protect" (A/63/677). The UN General Assembly has "taken note" of the Secretary-General's Report in Resolution 63/308 (14 September 2009), adopted without vote. The EU Report on the Implementation of the European Security Strategy "Providing Security in a Changing World", approved by the EU Council on 11 December 2008, also contains direct references to the responsibility to protect with regard to genocide, crimes against humanity, ethnic cleansing and war crimes (at 2, 12; available at <www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf>).

primary responsibility to protect their own citizens,[85] but if they are unable or unwilling to do so, then the international community has the complementary responsibility to step in and take action with or without the consent of the territorial State.[86] The responsibility to protect, which is a broader concept than "humanitarian intervention",[87] comprises a "continuum of obligations" including the responsibility to prevent, to react and to rebuild: the responsibility to prevent addresses "both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk", the responsibility to react involves responding "to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention", and the responsibility to rebuild means "to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert".[88]

The on-going humanitarian crisis in Darfur and the Rwanda and DRC syndromes have determined a growing support for the responsibility to protect doctrine in Africa. For instance, the recent 2008 ECOWAS Conflict Prevention Framework affirms that ECOWAS can intervene (militarily if necessary) to protect human security and to exercise the responsibility to prevent, react "in response to grave and compelling humanitarian disasters" and rebuild.[89] At least five of the ten Protocols that form an integral part of the Great Lakes Pact aim to implement aspects of the responsibility to protect. The Non-aggression and Mutual Defence Protocol, however, refers to it expressly.[90] Article 3 (2) affirms the "primary responsibility of Member States to preserve the integrity of their sovereignty and to protect the lives and human rights of all persons and all peoples, including women and children, residing within their territories". The complementary responsibility of other States is recognized in Article 4 (8), according to which "Member States agree that the provisions of this Article [on the prohibition of the threat and use of force] and Article 5 [on non-aggression] of this Protocol shall not impair the exercise of their responsibility to protect populations from genocide, war crimes, eth-

[85] According to the ICISS Report, "sovereignty implies a dual responsibility: externally – to respect sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the State" (The Responsibility to Protect, above note 81, para. 1.35).

[86] "The Responsibility to Protect", above note 81, para. 2.29; "A More Secure World", above note 23, para. 201; "In Larger Freedom", above note 23, para. 135; 2005 World Summit Outcome Document, above note 23, paras. 138-139.

[87] "The Responsibility to Protect", above note 81, para. 2.29. In his recent Report, the UN Secretary-General recalled that "the responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than from the narrower idea of humanitarian intervention" ("Implementing the Responsibility to Protect", above note 84, para. 10 (a)).

[88] "The Responsibility to Protect", above note 81, at xi.

[89] The ECOWAS Conflict Prevention Framework, above note 28, paras. 26, 41.

[90] The drafters of the Protocol were influenced by the 2005 World Summit Outcome Document, that had just been adopted.

nic cleansing, crimes against humanity, and gross violations of human rights committed by, or within, a State".[91] As this provision is drafted as an exception to the renunciation of the threat and use of force and to the prohibition of aggression, it implies that the responsibility to protect (and, in particular, to react) can also be exercised through the unilateral use of military force, an option that the ICISS expressly admits if only in extreme cases and as a last resort.[92] This seems confirmed by the Joint Statement of the Heads of State of the Great Lakes Region of 7 November 2008, according to which "[t]he Great Lakes region would not stand by to witness incessant and destructive acts of violence by any armed groups against innocent people of DRC; if and when necessary the Great Lakes Region will send peacemaking forces into the Kivu Province of the DRC".[93] However, it is well-known that the UN Charter only provides for two exceptions to the prohibition of the use of armed force (i.e. self-defence and collective security under Chapter VII) and, as recognized by the ICISS itself,[94] it is doubtful that customary international law allows armed interventions on grounds of humanity.[95]

This claim to use force in order to protect populations is also contained in other African sub-regional treaties, which however employ the more traditional expression "humanitarian intervention".[96] At the regional level, Article 4 (h) of the AU Constitutive Act provides that one of the basic principles on which the African Union is founded is "the right of the Union to intervene in a Member State pursu-

[91] An identical reference to the responsibility to protect also appears in the preamble.

[92] "The Responsibility to Protect", above note 81, paras. 4.1, 4.10 ff. According to the ICISS, the military action must meet six criteria: right authority, just cause, right intention, last resort, proportional means and reasonable prospects (ibid., para. 4.16). The Report, however, does not explain the grounds on which the legality would be founded (J.I. Levitt, The Responsibility to Protect: A Beaver Without a Dam?, 25 Michigan Journal of International Law (2003-2004), 161). On the contrary, the recent UN Secretary-General Report "Implementing the Responsibility to Protect" clearly affirms that "the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter" (above note 84, para. 3).

[93] The Joint Statement can be read at <www.lse.ac.uk/collections/law/projects/greatlakes/ihl-greatlakes-summary-new-latest.htm>.

[94] According to the Commission, "there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law" allowing intervention for human protection purposes ("The Responsibility to Protect", above note 81, paras. 2.24 and 6.17). The responsibility to protect, thus, is not a legal principle but rather a policy option (E. McClean, The Responsibility to Protect: The Role of International Human Rights Law, 13 Journal of Conflict and Security Law (2008), 135).

[95] Gray, above note 68, 51.

[96] This terminology is criticized by the ICISS as it might cast an aggressive light on the intervening States ("The Responsibility to Protect", above note 81, paras. 1.39-1.41). See, e.g., the Protocol Relating to the Peace and Security Council of Central Africa (COPAX), whose Art. 24 provides that the Multinational Force of Central Africa (FOMAC) will be entrusted, inter alia, with "humanitarian intervention following a humanitarian disaster". The same task is given to ECOMOG by Art. 22 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security. Art. 40 further specifies that "ECOWAS shall intervene to alleviate the suffering of the populations and restore life to normalcy in the event of crises, conflict and disaster". However, the subsequent ECOWAS Conflict Prevention Framework, adopted in 2008, refers to the "responsibility to react", above note 28, see para. 41.

ant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity".[97] There are several important differences between the AU Constitutive Act and the Great Lakes Protocol. First of all, while the AU Constitutive Act refers to a *right* of intervention,[98] the Protocol employs the ambiguous notion of "responsibility", which seems to imply that taking action is not only a right of the States parties but also an obligation that has to be performed after a collective decision and with due notice to the AU Peace and Security Council and the UN Security Council. It is however difficult to see how the responsibility to protect could amount to a positive obligation: the 2005 World Summit Outcome Document is cautious on this point[99] and several States, including the United Kingdom and the United States, have clearly indicated that they regard the "responsibility to protect" as a political, not legal, commitment.[100] Even assuming that it is indeed an obligation, then the problem arises of what are the legal consequences of its violation.[101]

Second, the Great Lakes Protocol extends the circumstances that trigger the possible armed reaction to cover not only genocide, crimes against humanity and war crimes, but also ethnic cleansing and gross violations of human rights.[102] The lan-

[97] This right is reiterated in Art. 4 (j) of the Protocol Relating to the Establishment of the AU Peace and Security Council. The right of intervention pertains to the Union, and not to individual member States, which are under an obligation not to interfere in the internal affairs of another State (Art. 4 (g) of the AU Constitutive Act). The Assembly is the organ that decides on intervention with respect to war crimes, crimes against humanity and genocide.

[98] On the contrary, Art. 3 (d) of the AU Non-aggression Pact seems to refer more to an obligation than to a right of intervention, where it provides that "States Parties *undertake* to prohibit and prevent genocide, other forms of mass murder as well as crimes against humanity" (emphasis added).

[99] 2005 World Summit Outcome Document, above note 23, para. 139 ("[W]e are prepared to take collective action [...] on a case-by-case basis").

[100] Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?, House of Commons Library Research Paper 08/55 (17 June 2008), 26-27.

[101] C. Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?, 101 AJIL (2007), 117-118. On the justiciability of the obligation to intervene, at least to prevent genocide, see G.A. Critchlow, Stopping Genocide Through International Agreement when the Security Council Fails to Act, 40 Georgetown Journal of International Law (2009), 330-332.

[102] It appears that "[t]he limitation of the grounds for intervention to war crimes, genocide and crimes against humanity [in the AU Constitutive Act] was predicated on the understanding that these acts are now generally recognized as violations of international law, as evidenced in the statutes of the international criminal tribunals for Rwanda and the Former Yugoslavia, and more recently the Rome Statute of the International Criminal Court. As it presently stands, therefore, Article 4 (h) is in line with current international law" (T. Maluwa, The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?, 98 ASIL Proceedings (2004), 236). The ICISS refers the responsibility to protect to "extreme cases" where "serious and irreparable harm [is] occurring to human beings, or imminently likely to occur", in particular "large scale loss of life, actual or apprehended, with genocidal intent or not" and "large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape" ("The Responsibility to Protect", above note 81, paras. 4.18-4.19). The High-Level Panel's Report refers to "genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law" and to "mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease" (above note 82, paras. 201, 207). The "In Larger Freedom" Report more vaguely refers to "human rights and well-being of civilian populations" (above note 23, para. 135). The 2005

guage on this point differs from treaty to treaty. For instance, unlike the AU Constitutive Act, Article 3 (d) of the AU Non-aggression Pact refers to "genocide, other forms of mass murder as well as crimes against humanity". The 2001 SADC Protocol on Politics, Defence and Security Co-operation, as to it, includes genocide, ethnic cleansing and gross violations of human rights among the matters that might give rise to the Organ's action, but not war crimes and crimes against humanity (Article 11 (2) (b) (i)). The 1999 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security adopts a more general and vague language and refers to an internal conflict that threatens to cause a "humanitarian disaster" and to "serious and massive violation of human rights and the rule of law" (Article 25), while the almost identical Article 25 of the COPAX Protocol omits the reference to the massive violations of human rights. Finally, according to the ECCAS Pact of Mutual Assistance, FOMAC's intervention can take place when necessary to put an end to the commission of international crimes (Article 7 (1)). War crimes, genocide and crimes against humanity are not defined in the Great Lakes Non-aggression Protocol, but Article 1 of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination (also part of the Great Lakes Pact) refers to the definitions contained in Articles 6, 7 and 8 of the 1998 Rome Statute of the International Criminal Court (ICC).[103] This is not entirely satisfactory, as not all war crimes under customary international law have been incorporated in the Rome Statute and some of them have been defined more narrowly.[104] Furthermore, the ICC definition of crimes against humanity, that limits them to attacks directed against civilian populations only, probably does not reflect customary international law.[105] Unsatisfactorily as it might be, at least war crimes, crimes against humanity and genocide have been defined, although indirectly, in the Great Lakes Pact. On the other hand, the inclusion of ethnic cleansing is problematic, as the exact legal meaning of this expression is not uncontroversial.[106] Furthermore, massive violations of human rights may jus-

World Summit Outcome Document mentions genocide, war crimes, ethnic cleansing and crimes against humanity (above note 23, paras. 138-139). In his 2009 Report, the UN Secretary-General argues that "[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities [...] would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility" ("Implementing the Responsibility to Protect", above note 84, para. 10 (b)).

[103] It is worth recalling that all the four situations currently being investigated by the ICC refer to States parties to the Great Lakes Pact (DRC, Uganda, CAR and Sudan).

[104] A. Cassese, International Criminal Law, Oxford 2008, 94-97.

[105] Cassese, above note 104, 122-123.

[106] N. Lerner, Ethnic Cleansing, 24 Israel Yearbook on Human Rights (1994), 105-109, 116; D. Petrovic, Ethnic Cleansing – An Attempt at Methodology, 5 European Journal of International Law (1994), 344, 351, who defines "ethnic cleansing" as "a well-defined policy of a particular group of persons to systematically eliminate another group from a given territory on the basis of religious, ethnic or national origin [which] involves violence and is very often connected with military operations" (ibid., 351). The ICJ referred to "ethnic cleansing" in the *Genocide* case (*Bosnia and Herzegovina v.*

tify condemnation or sanctions, but not coercive measures: their inclusion in Article 4 (8) of the Great Lakes Non-aggression Protocol is dangerous, as it might be used as a pretext for abusive interventions, especially considering the human rights record of many African countries. The problem is exacerbated by the fact that nowhere does the Protocol specify who should ascertain when the relevant situations (i.e., genocide, war crimes, crimes against humanity, ethnic cleansing and gross violations of human rights) have arisen, even though this is of extreme importance, since it is their occurrence that justifies the intervention. Article 4 (8) of the Great Lakes Protocol limits itself to say that the decision to exercise the responsibility to protect, which logically involves the previous establishment that the pertinent situations have occurred, has to be taken "collectively". However, much room is left to political appreciation.[107]

Finally, and most importantly, Article 4 (h) of the AU Constitutive Act provides for a right of intervention in a member State.[108] This allows to construe the provision consistently with the UN Charter and customary international law. Indeed, it can be argued that the AU Constitutive Act does not introduce a further exception to the prohibition of the use of force, as it limits itself to provide for a case of intervention by invitation, where the invitation is given by a State not on a case-by-case basis with regard to a specific existing event, but "pre-emptively" by ratifying the Act or the Protocol and therefore by consenting in advance to the right of the Union to intervene on the member State's territory if any of the listed grave circumstances occurs.[109] The language of the Great Lakes Protocol is different, as the responsibility to protect is invoked with regard to violations committed

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Serbia and Montenegro), Merits, Judgment of 26 February 2007, para. 190, where, by referring to the Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), it defined it as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area". On the definition of "ethnic cleansing" and on whether it amounts to genocide, see W.A. Schabas, Genocide in International Law, Cambridge 2009, 221-234. It should be noted that ethnic cleansing is included among the grounds for the exercise of the responsibility to protect in the ICISS Report (above note 81, para. 4.19), the High-Level Panel Report "A More Secure World" (above note 23, para. 203) and the 2005 Outcome Document (above note 23, para. 138). In his recent Report on the implementation of the responsibility to protect, though, the UN Secretary-General noted that "[e]thnic cleansing is not a crime in its own right under international law, but acts of ethnic cleansing may constitute one of the three crimes [genocide, war crimes, crimes against humanity]" ("Implementing the Responsibility to Protect", above note 84, para. 3).

[107] This point is highlighted by Abass with regard to Art. 4 (h) of the AU Constitutive Act (A. Abass, The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia, 54 Netherlands International Law Review (2007), 426).

[108] More problematic is Art. 3 (d) of the AU Pact on Non-aggression, as it does not limit the commitment to prohibit and prevent genocide, crimes against humanity and "other forms of mass murder" to the territory of member States. However, as Art. 17 provides that the Pact cannot be interpreted as derogating from the provisions of the UN Charter and the AU Constitutive Act, the same considerations made with regard to the Great Lakes Protocol would apply (see below, note 114 et seq. and accompanying text).

[109] This is also the opinion of A. Abass and M.A. Baderin, Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union, 49 Netherlands International Law Review (2002), 18-19.

by, or within, "a State", not necessarily a State party. By doing so, the Great Lakes States claim a responsibility to intervene on the territory of any State even without its consent. It is also worth noting that the intervention is not subordinated to the previous authorization of the UN Security Council: Article 4 (8) refers only to a "procedural notice" to the AU Peace and Security Council and to the UN Security Council.[110] This echoes Article 52 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, which provides for a mere duty to inform the United Nations, "[i]n accordance with Chapters VII and VIII" of the Charter, of any military intervention undertaken by the Organization, but differs from the SADC Protocol on Politics, Defence and Security Co-operation, whose Article 11 (3) (d) subordinates enforcement action, including in the case of genocide, ethnic cleansing and gross violations of human rights, to the authorization of the UN Security Council, in accordance with Article 53 of the Charter. Not even an *ex post facto* authorization is required by the Great Lakes Protocol, as recommended by the ICISS Report,[111] the High-Level Panel's "A More Secure World"[112] and the AU Common Position known as the "Ezulwini Consensus".[113] The only limit is that the decision be taken "collectively", which seems to prohibit interventions at the initiative of individual States.

The provision under examination raises serious problems. It is clearly inconsistent with both the UN Charter and the AU Constitutive Act, as "military intervention for human protection purposes without the authorization of the Security Council is still illegal".[114] However, Article 10 (3) of the Great Lakes Protocol states that "[n]othing contained in this Protocol shall be construed to be contrary to the provisions of the Pact, the Constitutive Act of the African Union, and the Charter of the United Nations". The only way to construe the Protocol consistently with the UN Charter and with the AU Constitutive Act would be to interpret the reference to "a State" as to "a member State", therefore providing for a case of intervention by invitation as in the AU Constitutive Act. Indeed, in his Re-

[110] The ICISS does not rule out the use of force not authorized by the Security Council if a "conscience-shocking situation crying out for action" occurs and the Security Council is inactive, although it does not take position on its legality ("The Responsibility to Protect", above note 81, paras. 6.37-6.40). On the contrary, the UN documents all require Security Council authorization for the use of military force ("A More Secure World", above note 23, para. 203; "In Larger Freedom", above note 23, para. 126; World Summit Outcome Document, above note 23, para. 139; "Implementing the Responsibility to Protect", above note 84, para. 11 (c)).

[111] "The Responsibility to Protect", above note 81, at xiii.

[112] "A More Secure World", above note 23, para. 272.

[113] AU Common Position on the Report of the High-Level Panel on Threats, Challenges and Change (Ext/EX.CL/2 (VII) (7-8 March 2005), <www.responsibilitytoprotect.org/files/AU_Ezulwini%20Consensus.pdf>, at 6 ("Intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action").

[114] G. Molier, Humanitarian Intervention and the Responsibility to Protect After 9/11, 53 Netherlands International Law Review (2006), 52.

port on the Fragmentation of International Law, *Koskenniemi* suggests that clauses like Article 10 (3) provide for a "rebuttable presumption of harmony between the earlier and the subsequent treaty".[115] Similarly, Jennings and Watts claim the existence of a "presumption that the parties intend something not inconsistent with generally recognized principles of international law, or with previous treaty obligations towards third states".[116] Furthermore, although not referring to a treaty but to the declaration by which Portugal had accepted the ICJ jurisdiction, in the *Right of Passage (Preliminary Objections)* case the Court held that "[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it".[117] The above suggested interpretation of Article 4 (8) would also be consistent with Article 2 of the Great Lakes Protocol, which reaffirms the respect for the sovereignty, inviolability of borders and territorial integrity of (all) States.

5. Intervention to Restore Democracy

Democracy, development and security are strongly linked in Africa, where the enhancement of democratic institutions is seen as essential for improved economic performance.[118] The adoption, in 2003, of a Protocol amending the AU Constitutive Act has to be read in this light. When the Protocol enters into force, Article 4 (h) of the AU Constitutive Act will incorporate "serious threats to legitimate order" as a further ground for intervention by the Union.[119] The Protocol does not explain what the "legitimate order" is: however, Article 24 of the 2007 African Charter on Democracy, Elections and Governance may provide some guidance to the relevant AU organs where it states that "[w]hen a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its re-

[115] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, 136.

[116] R. Jennings and A. Watts (eds.), Oppenheim's International Law, London 1992, Vol. I, Parts 2-4, 1275.

[117] ICJ Reports (1957), 142.

[118] Cilliers, above note 27, 40, 42. The 2002 New Partnership for Africa's Development (NEPAD)'s Declaration on Democracy, Political, Economic and Corporate Governance, as noted by the AU Assembly, states that "stability, peace and security in the African continent [...] are essential conditions for sustainable development, alongside democracy, good governance, human rights, social development, protection of the environment and sound economic management" (para. 9; available at <www.nepad.org/2005/files/documents/2.pdf>).

[119] The amendment was initially proposed by Libya to prevent threats to African regimes from outside the continent (M. Kunschak, The African Union and the Right to Intervention: Is There a Need for UN Security Council Authorisation?, 31 South African Yearbook of International Law (2006), 199). With regard to this new ground for intervention, the AU Assembly will act upon recommendation of the Peace and Security Council.

sponsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union".[120] This AU claim for intervention is not however a novelty in the African region.[121] Article 11 (2) (b) (ii) of the SADC Protocol on Politics, Defence and Security Cooperation includes "a military coup or other threat to the legitimate authority of a State" among the situations that justify enforcement action by the Organ. Article 25 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security provides that the Mechanism shall be activated in the event of, inter alia, an "overthrow or attempted overthrow of a democratically elected government", while the ECCAS Protocol Relating to the Peace and Security Council of Central Africa contains an almost identical provision, which however refers to the "constitutional institutions" of a member State, and not to a "democratically elected government" (Article 25). Finally, the CEMAC Pact on Non-aggression, Solidarity and Mutual Assistance provides for a duty of mutual assistance, inter alia, "devant un cas de trouble grave de nature à perturber la stabilité intérieure, à remettre en cause la légalité républicaine et à porter préjudice au bon fonctionnement de la Communauté dans son ensemble" (Article 4). All the above provisions do not seek to impose a certain government, but rather aim to preserve the existing ones from unconstitutional seizures of power. The difference between the AU, SADC, CEMAC and ECCAS Protocols on the one hand and the ECOWAS Protocol on the other is that the former do not expressly require that the ousted government be democratic or democratically elected and might thus be interpreted as prioritizing regime security over human security.[122] On the other hand, the SADC Protocol is the only one that expressly submits the intervention to the Security Council's authorization (Article 11 (3) (d)).[123]

[120] Art. 23 also defines an "unconstitutional change of government" as including "[a]ny putsch or coup d'Etat against a democratically elected government. 2. Any intervention by mercenaries to replace a democratically elected government. 3. Any replacement of a democratically elected government by armed dissidents or rebels. 4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or 5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government". It has been argued that any AU intervention to restore the legitimate order would have to "conform to the hopes and aspirations of the African peoples" and therefore a regime that does not comply with the fundamental values of the Constitutive Act would not be protected by the mechanism (B. Kioko, The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention, 85 International Review of the Red Cross (2003), 816).

[121] It has indeed been claimed that pro-democratic intervention, defined as "intervention by a state, a group of states or a regional organization in another state involving the threat or use of force in order to protect or restore a democratically constituted government […] from unlawful and or violent seizures of power" (J. I. Levitt, Pro-democratic Intervention in Africa, in J.I. Levitt (ed.), Africa – Mapping New Boundaries in International Law, Oxford-Portland 2008, 107), is "firmly established in customary regional law in Africa" (ibid., 147). This is doubted by Gray, above note 68, 59, 418-423.

[122] E. Baimu and K. Sturman, Amendment to the African Union's Right to Intervene: A Shift from Human Security to Regime Security, 12 African Security Review (2003), 43.

[123] As to the AU, CEMAC and ECCAS Protocols, the argument could be made that, by ratifying them, the States parties have also accepted the provisions contained therein that empower the organi-

The Great Lakes Regional Programme of Action for the Promotion of Democracy and Good Governance includes a Protocol on Democracy and Good Governance, the preamble of which recalls that "the accumulated deficits in the matter of democratization are at the origin of the conflicts in the Great Lakes Region". Article 2 of the Protocol also commits the member States to comply with democratic constitutional principles, such as the separation of powers, accession to power through regular, free, fair and transparent elections and the prohibition of unconstitutional change and any other undemocratic means of acceding to or maintaining power, the public participation in decision-making process in accordance with democratic principles and decentralization, the decentralization of power at all levels of governments, the non-partisan character of the defence and security forces, the secular nature of the State and its institutions, the promotion of national unity of the State and its institutions, the prohibition of any ethnic, religious, racial, gender or regional discrimination, the equality of men and women, including through affirmative action policies, the political pluralism, the freedom of association, assembly and peaceful demonstration, the freedom of expression, the freedom of movement and the prohibition of forced exile.

However, nowhere in the Great Lakes Pact is the use of military force envisaged as a possible tool to enforce this commitment to democracy. The Protocol on Non-aggression and Mutual Defence only focuses on the obligation of the member States not to support directly or indirectly armed groups engaged in the unconstitutional overthrow of the government of another State, be it democratic or not (Article 4 (5)), and does not make reference to the use of force in order to restore a democratic government in another State. On the other hand, Article 23 (6) of the Pact states that "[a] Member State that is unable or unwilling to honor its obligations under this Pact [including those on democracy] shall account for its failure before the Summit which will determine the consequences of such failure".[124] More specifically, Article 48 of the above mentioned Democracy and Good Governance Protocol provides that "[i]n the event of threats to democracy and a beginning of its breakdown by whatever process and in the event of massive violations of human and peoples' rights in a Member State, the Summit shall convene an extraordinary session in order to adopt urgent and appropriate measures to put an end to the situation". It is not clear what "urgent and appropriate measures" the Summit could adopt, and in particular whether it could decide enforcement action. The preferable answer seems to be negative, if one considers that, under Article 28 of the Pact, the member States commit themselves to settle their disputes peacefully "within the framework of the Conference's Regional Follow-up Mechanism" and

zations to intervene should the threat to the legitimate order or the overthrow of the government occur, therefore consenting in advance to the intervention on their territories. Obviously, this assumes that the right of intervention is provided only with regard to the member States' territory.

[124] The Summit is the supreme organ of the Conference and part of the Regional Follow-up Mechanism: it takes its decisions by consensus, or, failing this, by a qualified majority of eight of the eleven member States present and voting in case of non-procedural matters and by an absolute majority in case of procedural matters (Article 23 (7) of the Pact).

no mention is made of coercive measures. Furthermore, the list of sanctions that the Conference might adopt in case of threats or breakdown of democracy only includes non-military measures, such as the refusal to support the candidatures to elective positions in international organizations presented by the member State concerned, the refusal to hold any meeting of the International Conference in the member State concerned and the suspension of the member State concerned in all bodies of the Conference: if an "action" is needed, the matter must be referred to the UN and AU "in accordance with established procedures" (Article 49 of the Democracy and Good Governance Protocol). This is in contrast with other African regional and sub-regional organizations that have set up collective mechanisms to deal with violations of the treaty regime and with threats to regional peace and security also through military means, if necessary.[125]

6. Conclusions

The Martinican writer and psychiatrist Frantz Fanon once famously noted that Africa is shaped like a revolver and the Congo is its trigger.[126] One of the purposes of the Great Lakes Pact, and of the Protocol on Non-aggression in particular, is to disable that trigger and create conditions of sustainable peace in the Great Lakes Region. The Protocol is permeated by an evident disfavor towards non-State armed groups: it includes them among the perpetrators of aggression, it allows self-defence against armed attacks by non-State actors and it upgrades whatsoever support to armed groups from unlawful intervention in another State's internal affairs to violation of the prohibition of the use of force. States parties are also expressly required to adopt measures against armed groups, and in particular to apprehend, intercept and disarm those operating from within their territory. The reasons for such disfavor are easy to understand if one considers that the presence of insurgents and militias has long destabilized the Great Lakes Region and continues to threaten the peace process.

Another trademark of the Great Lakes Protocol is its use of en vogue catchphrases like "human security" and "responsibility to protect" in the context of *ius ad bellum*. In fact, the Protocol is probably the first security treaty to expressly refer to the responsibility to protect. Article 4 (8), however, is problematic where it appears to allow armed intervention to protect populations even without the consent of the territorial State: this author has argued that the provision can and should be harmonized with the Charter and interpreted as providing for a case of intervention by "pre-emptive" invitation if certain grave situations occur. If this conclusion is correct, the significance of the Protocol as well as of other African treaties containing similar provisions (e.g., Article 4 (h) of the AU Constitutive

[125] This is the case, for instance, of the AU, ECOWAS, ECCAS and SADC.

[126] Quoted in I. Taylor and P. Williams, South African Foreign Policy and the Great Lakes Crisis: African Renaissance Meets *Vagabondage Politique*?, 100 African Affairs (2001), 265.

Act) is not, as often argued, that they contain regional rules on the use of force that depart from the universal ones, but rather that, by concluding them, the African States have chosen to relinquish part of their sovereignty so to allow external interventions on their territory if massive human rights violations are perpetrated. It is therefore more a political change of attitude than a legal innovation.

The Great Lakes Protocol also conforms to existing *ius ad bellum* in that, unlike other African treaties, it correctly does not envisage the use of force in order to restore an ousted democratic government, but refers any action to that purpose to the AU and to the UN. The only Protocol provisions that cannot be reconciled with existing law are those that allow self-defence not only in reaction to an armed attack, but also in the case of "failure […] to intercept and disarm members of an armed group pursued by the defence and security forces of a Member State" (Article 8 (10)) and in order to "restore and maintain the peace, security, stability, and development of the Great Lakes Region" (Article 6 (3)). These provisions go well beyond the narrow limits under which self-defence is permissible under Article 51 of the UN Charter: as the Charter prevails under Article 10 (3) of the Protocol and Article 103 of the Charter, they are inoperative and cannot confer any further right to the States parties.

Although the Great Lakes Non-aggression Protocol is not faultless, it is now essential that the ratification process is completed and that the States parties fully and promptly implement it (as well as the rest of the Pact), for instance by concluding the bilateral arrangements envisaged in Article 8 (7), by establishing mechanisms for control, surveillance and management of common borders (Article 7) and by adopting common policies and strategies in order to eradicate the proliferation of small arms and light weapons in the region as required by Article 9. Whether this will be enough to prevent the pathological recurrence of armed conflicts in the Great Lakes Region, only time will tell.