Of Norms and Ambiguity: The Contested Authority of UN Security Council and African Union in the Use of Force in Africa

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Abstract

There has been a renewed interest in the debates on the use of force. This resurgence in academic and policy circles can be attributed to the new wave of military interventions after the initial hiatus of the Global War on Terror period. The recent cases of the use of force are once again raising pertinent legal questions regarding the responsibility for the maintenance of international peace and security which is vested in the United Nations Security Council (UNSC) by the United Nations (UN) Charter. This authority, exemplified by the UNSC control of the use of force has been challenged by unilateral recourse to force by States, coalitions of States and regional organisations. The African Union (AU) has developed regional legal frameworks which may contest some established legal norms on the use of force, including the primary responsibility of the UNSC to authorise the use of force for the maintenance of international peace and security. In this article, I delineate

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these norm contestations and identify specific modes of such contestations in UNSC-AU relationship within the frameworks of their respective constitutive treaties. I draw on the idea of norm localisation and subsidiarity to understand the African Union's approach to its relationship with the UNSC, the ways in which these norm contestations impact that relationship and how the contestations affect the norm on the use of force.

Keywords

African Union – UN Security Council – Norm Contestation – Use of Force – international peace and security

I. Introduction

The basis on which States may lawfully resort to the use of force under international law has once again dominated academic debates among international law scholars in recent years.[1] This debate has intensified along three main trajectories in the last three decades – the use of force to halt or prevent humanitarian catastrophes (first, under the doctrine of humanitarian intervention and subsequently the principle of the responsibility to protect (R2P)); the use of force in self-defence especially against Non-State Armed Groups such as terrorists (sometimes phrased as pre-emptive self-defence); and the use of force by regional organisations. In this paper, I am concerned with the later dimension – the use of force by the African Union as a regional organisation. The relationship, between regional organisations and the UN is governed by Chapter VIII of the UN Charter, and that arrangement, built on the compromise between universalists and regionalists at the San Francisco

[1] See for example, Dapo Akande and Katie Johnston, 'Implications of the Diversity of the Rules on the Use of Force for Change in the Law', EJIL 32 (2021), 679-697; Federica I. Paddeu, 'Humanitarian Intervention and the Law of State Responsibility', EJIL 32 (2021), 649-678; Kevin Jon Heller, 'The Illegality of "Genuine" Unilateral Humanitarian Intervention', EJIL 32 (2021), 613-647; Agata Kleczkowska, 'The Meaning of Treaty Authorisation and ad hoc Consent for the Legality of Military Assistance on Request' Journal on the Use of Force and International Law 7 (2020), 270-291. See Rajan Menon, *The Conceit of Humanitarian Intervention* (Oxford: Oxford University Press 2016) critiquing the hypocritical application of the doctrine of humanitarian intervention; Mark Swatek-Evenstein, *The History of Humanitarian Intervention* (Cambridge: Cambridge University Press 2020) dissecting the controversial nature of humanitarian intervention both in its origin, theory, and practice; Chris O'Meara, 'Should International Law Recognise a Right of Humanitarian Intervention?', ICLQ 66 (2017), 441-466.

Conference manifested tensions from the very beginning.[2] The intra-state nature of conflicts,[3] the proliferation of regional organisations, the increasing role and scope of activities of regional organisations in the international legal order, post-Cold War changes, coupled with rapid globalisation and the rise of new Non-State Actors have all combined to produce a complex space of global governance with implications for the evolution of the law and practice of the use of force by regional organisations.[4]

As these developments unfolded back in the 1990 s, the Organisation of African Unity (OAU) which was established in 1963 to, inter alia, eradicate colonialism from Africa, had to grapple with growing peace and security challenges in many African countries characterised by mass atrocities following the collapse of several authoritarian regimes and weak states.[5] For example, the collapse of the government of General Samuel Doe of Liberia (1989-1990), General Joseph Momoh of Sierra Leone (1991), General Said Bare of Somalia (1990-1991), Juvenal Habyarimana of Rwanda (1994), just to name a few.[6] As a matter of principle, the OAU hardly intervened in the internal affairs of member states even in glaring cases of mass atrocities because of its adherence to the principle of non-interference in the internal affairs of member states.[7] The OAU had to respond by accelerating its agenda of reform and renewal for a more effective continental organisation able to meet the challenges of the new millennium.[8] The result was a sweeping institu-

2 Amitav Acharya, 'Regionalism Beyond EU-Centrism', in: Tanja A. Borzel, Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (Oxford: Oxford University Press 2016), 109-132 (112); Anthony Clark Arend, 'The United Nations, Regional Organizations, and Military Operations: The Past and the Present', Duke J. Comp. & Int'l L. 7 (1996), 3-33 (5); Christoph Schreuer, 'Regionalism v. Universalism', EJIL 6 (1995), 477-499 (478).

3 Lotta Harbom and Peter Wallensteen, 'Armed Conflict and Its International Dimensions, 1946-2004', JPR 42 (2005), 623-635 (624).

4 Ademola Abass, *Regional Organisations and the Development of Collective Security* (Portland: Hart Publishing 2004), xx – xxi, 3-4.

5 See OAU, Report of the Secretary General to the Fourth Extraordinary Session of the Assembly of Heads of States and Government, 8-9 September, 1999, Sirte, Libya, EAHG/2(IV), 3-8; see the Sirte Declaration, EAHG/Decl. (IV) Rev. 1, 9 September, 1999.

6 See Edmond J. Keller, 'Toward a New African Political Order' in: Edmond J. Keller and Donald Rothchild (eds), *Africa in the New International Order: Rethinking State Sovereignty and Regional Security* (London: Lynne & Rienner Publishers 1996), 1-14 (1).

7 See Tiyanjana Maluwa, 'Reassessing Aspects of the Contribution of African States to the Development of International Law Through African Regional Multilateral Treaties', Mich. J. Int'l L. 41 (2020), 327-415 (378-394, 382).

8 The African Union (AU) was established by Article 1 of the Constitutive Act of the African Union adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) on 11 July 2000 in Lome, Togo, OAU, AHG/Dec.143 (XXXVI). The Constitutive Act entered into force on 26 May 2001. However, in terms of Article 33(1), the OAU remained in existence for a transitional period until the formal inauguration of the AU on 9 July 2002 in Durban, South Africa. See

tional and legal reform that produced some of the contested treaty norms we find in two key AU treaties today and which create the tension in AU relationship with the UNSC. The core of this contestation is the compatibility of Article 4(h) of the AU Constitutive Act with Article 2(4) and 53(1) of the UN Charter, and the consistency of Articles 16(1) and 17(1) of the Protocol of the AU Peace and Security Council (AUPSC Protocol), with Article 53(1) of the UN Charter. Article 4 of the AU Constitutive Act states inter alia, that the AU shall function in accordance with the following principles:

> […]
> '(h) [t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.
> […]
> (j) the right of Member States to request intervention from the Union in order to restore peace and security.

Similar provisions can be found in Article 4(j) of the African Union Peace and Security Council (AUPSC) Protocol aimed at operationalising the Constitutive Act and AU decisions in this regard.[9] A combined reading of these provisions raises questions about their legal effect on AU-UNSC relationship on the use of force for the maintenance of peace and security in Africa.[10] In the over two decades since its adoption, how have these treaty norms been understood and what are their effects on the norm prohibiting the use of force in international law? Some commentators argue that Article 4(h) is invalid because it imposes treaty obligations that are inconsistent with the UN Charter.[11] Others defend the legal validity of

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Tiyanjana Maluwa, 'Reimagining African Unity: Preliminary Reflections on the Constitutive Act of the African Union', AYIL 9 (2001), 3-38. See also Abdulqawi A. Yusuf, Pan-Africanism and International Law (Leiden: Brill 2014), 1.

9 Protocol Relating to the Establishment of the Peace and Security Council of the African Union adopted at the 1st Ordinary Session of the Assembly of the African Union at Durban, South Africa, on 9 July, 2002.

10 Kleczkowska (n. 1); Marko Svicevic, 'Re-Assessing the (Continued) Need for UN Security Council Authorisation of Regional Enforcement Action: The African Union Twenty Years On', SAYIL 45 (2020), 1-32; Claus Kreß and Benjamin Nußberger, 'Pro-Democratic Intervention in Current International Law: the Case of The Gambia in January', Journal on the Use of Force and International Law 4 (2017), 239-252.

11 See John-Mark Iyi, Humanitarian Intervention and the AU-ECOWAS Intervention Treaties under International Law: Towards a Theory of Regional Responsibility to Protect (Cham: Springer 2016); Jeremy Levitt 'The Evolving Intervention Regime in Africa: From Basket Case to Market Place?', ASIL Proceedings 96 (2002), 136-143. But *contra*, see Jeremy Levitt, 'Pro-Democratic Intervention in Africa', Wisconsin Journal of International Law 24

Article 4(h).[12] Some have sought a middle ground by arguing that regardless of its provisions, it is actual AU practice of Article 4(h) and UNSC response that would determine its legal import.[13] Yet, others have expressed doubts about the possibility of 'the diversity of rules' on the use of force.[14] In this Article, I seek to do two things: draw on the work of Amitav Acharya on norm localisation and norm subsidiarity to explain the tension in AU-UNSC relationship and to reframe the question as not just one of legality but as one of norm contestation. This paper is divided into four parts including this introduction. Part 2 examines AU-UNSC relationship and highlights the areas of norm contestations that accentuate that relationship. Part 3 assesses the contested authority of the UNSC by the AU using Amitav Acharya's idea of 'norm localisation' and 'norm subsidiarity'. In Part IV, I highlight some of the effects of AU's norm contestation on the norm prohibiting the use of force and Part V offers concluding remarks.

II. The Relationship Between the AU and the UN Security Council in the Use of Force Under the UN Charter

The humanitarian intervention controversy of the 1990 s led to calls for a reform of the UN Charter rules on the use of force in order to respond to mass atrocities.[15] Many authors are of the view that humanitarian intervention (whether collective or otherwise) is unlawful under the UN Charter

(2006), 785-833 (832); and Jeremy Levitt, 'The Law on Intervention: Africa's Pathbreaking Model', Global Dialogue 7 (2005), 50-58 (51) (arguing in support of the legitimacy of Article 4 (h) and the emergence of an African regional norm of intervention *vis-a-vis* the authority of the UNSC).

12 Bernhardt had observed at the time '[i]f the members of a regional arrangement, […] agree that in case of internal disturbances or other events within one of the States concerned, the other States can intervene with military forces without the consent of the de jure or de facto government, the compatibility of such a special agreement with the Charter becomes doubtful and must, in principle be denied. Here, the territorial integrity of all States and the prohibition of the use of force is at stake. An agreement permitting forceful intervention would hardly be compatible with the Charter and would fall under Article 103.' See Rudolf Bernhardt, 'Article 103' in: Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford: Oxford University Press 2002), 1292-1302.

13 Erika De Wet, *Military Assistance on Request and the Use of Force* (Oxford: Oxford University Press 2020), 4-5.

14 Akande and Johnston (n. 1), 679-680.

15 This is captured in the famous question posed by Kofi Annan that 'If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?' Kofi Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (New York: United Nations 2000), 48.

paradigm.[16] However, there are those who argue that humanitarian intervention may be lawful under certain circumstances (e. g. where there is imminent threat of massive violation of human rights and the UNSC is deadlocked; and all non-military options to prevent or halt the violations have either been exhausted or have no reasonable prospects of success).[17] These proponents then list a host of criteria that must be fulfilled in order for such intervention to be legitimate.[18] These issues were tackled by the International Independent Commission on Kosovo as well as the International Commission on Intervention and State Sovereignty (ICISS) which both called for a rules-based approach on the use of force to respond to massive violations of human rights.[19] This rules-based approach implied establishing a system or set of rules or principles setting out under what circumstances it may be lawful to use force in the prevention of genocides, war crimes, and crimes against humanity and the proper authority to approve such use of force.[20]

At the global level, this effort culminated in the R2P principle adopted at the World Summit in 2005.[21] However, the articulation of the principles in paragraphs 138 and 139 of the World Summit Outcome Document still fell short of any serious normative improvement in the law relating to the use of force to protect populations from mass atrocities and its characterisation and application is still a subject of debate.[22] The debate often revolves around the

16 See for example, Ian Brownlie, 'Thoughts on Kind-Hearted Gunmen' in: Richard B. Lillich (ed.) *Humanitarian Intervention and the United Nations* (Charlottesville: Virginia University Press 1973), 139-148; Menon (n. 1); Mary Ellen O'Connell, 'The Popular but Unlawful Armed Reprisal', Ohio N. U. L. Rev. 44 (2018), 325-350 (346-350).

17 The collection of chapters in Jeff L. Holzgrefe and Robert Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press 2003) is an excellent volume on this debate. Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational Publishers Inc. 2005); Michael P. Scharf, 'Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention', Chi. J. Int'l L. 19 (2018), 586-614.

18 See for example, W. Michael Reisman, 'Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention', EJIL 11 (2000), 3-18; ICISS Report, paras 4.19, 4.32.

19 International Independent Commission on Kosovo, *Kosovo Report*: *Conflicts, International Response: Lessons Learned* (Oxford: Oxford University Press 2000), 192-197; ICISS Report, paras 51-55; Danish Institute of International Affairs, Humanitarian Intervention: Legal and Political Aspects (Skjern: Gullanders Bogtrykkeri a-s 1999), 106-111.

20 Cristina G. Badescu *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights* (London: Routledge 2011), 49.

21 UNGA 2005 World Summit Outcome Document, UNGA Res 60/1 of 24 October 2005.

22 Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm', AJIL 101 (2007), 99-120 (108-110); Jennifer Welsh, Caroline Thielking and Neil S MacFarlane, 'The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty', International Journal 57 (2002), 489-512 (498); Carlo

legality of the use of force by States or regional organisations. For example, whether UNSC authorisation must always be obtained, and under what circumstances (if any), would unauthorised intervention be lawful. These issues still remain at the heart of the invocation or non-invocation of R2P in practice today.[23] The 2011 North Atlantic Treaty Organization (NATO) intervention in Libya and its consequences brought this tension into sharp focus and is still a reference point in AU-UNSC relationship on the subject.[24] It is beyond the scope of this paper to undertake a detailed assessment of the impact of R2P but it suffices to say that recent appraisals by leading R2P scholars and critics on the occasion of R2P's tenth and fifteenth anniversaries suggest a mixed result of promise and disillusionment.[25]

Meanwhile, at the African regional level, R2P and the call for a rules-based approach had been foreshadowed by a normative shift from the OAU's rule of non-intervention encapsulated in Article III paragraph 2 of the OAU Charter to the AU's principle of non-indifference articulated in Article 4(h) of the AU Constitutive Act.[26] Many provisions of the Constitutive Act re-affirm Africa's commitment to several norms considered universal, but Article 4(h) sought to re-define the norms on the use of force in the context of AU-UNSC relationship and the UN Charter framework. Regional organisations occupy a significant position in the UN Charter framework on international peace and security and thus, their relationship with the UNSC may be viewed from two dimensions – one dimension in which they enjoy relative autonomy and another dimension in which they are subject to USNC control. It is in the later sphere that, what has been described as 'dormant normative tensions' between the AU and the UNSC can be observed.[27]

Focarelli 'The Responsibility to Protect: Too Many Ambiguities for a Working Doctrine', Journal of Conflict & Security Law 13 (2008), 191-213 (195 ff.).

23 For example, the atrocities in Syria, Yemen, and Myanmar.

24 Jennifer Welsh 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP', Ethics & Int'l. Aff. 25 (2011), 255-262 (259). See also Tiyanjana Maluwa, 'Stalling a Norm's Trajectory: Revisiting U. N. Security Council Resolution 1973 on Libya and Its Ramifications for the Principle of the Responsibility to Protect', Cal. W. Int'l L. J. 53 (2022), 70-114.

25 See Alex Bellamy, 'The Responsibility to Protect: Five Years On', Ethics & Int'l. Aff. 24 (2010), 143-169; Edward C. Luck, 'R2P at 10: A New Mindset for a New Era?', Global Governance 21 (2015), 499-504; Gareth Evans, 'The Dream and the Reality', Global Responsibility to Protect 12 (2020), 363-365.

26 Article III para. 2 states that member states 'solemnly affirm and declare their adherence to […] the principle of non-interference in the internal affairs of States'.

27 See Max Lesch and Christian Marxsen, 'Norm Contestation in International Peace and Security Law: Towards an Interdisciplinary Analytical Framework', Introduction to the Symposium 'Norm Contestation in International Peace and Security Law', held at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, on 23-24 September 2021, HJIL 83 (2023), 11-38.

Chapter VI of the UN Charter authorises regional organisations to adopt peaceful methods of dispute settlement and this role is further elaborated in Chapter VIII. Article 52 recognises the right of States to establish regional organisations and actually encourages them to be first responders to issues of peace and security and for the UNSC to refer disputes to regional organisations for peaceful resolution.[28] Since the end of the Cold War, successive UN Secretaries General have reiterated this point arguing that regional organisations should be empowered to play a more active role. In his *Agenda for Peace*, Boutros Ghali outlined a vision for the 'new era of opportunity' for the UN to utilise regional organisations to realise the purposes of the Charter.[29] He called for rethinking how regional organisations are viewed and their roles in the global collective security system of the UN, underscoring the potential this could have in deepening the democratisation of global governance and the maintenance of international peace and security.[30] Subsequent UN Secretaries General also built on some of these principles in developing UN-AU relationship.

The second dimension of the relationship between the UNSC and regional organisations relates to the use of force. Article 24(1) of the UN Charter confers the primary responsibility for the maintenance of international peace and security on the UNSC and UN Member States undertake to implement UNSC decisions.[31] Accordingly, Articles 39-42 of the Charter grant the UNSC extensive powers to discharge this responsibility. This collective security architecture situates the UNSC at the helm of international peace and security and it empowers the UNSC to exercise control over regional organisations in matters of the use of force.[32] Article 53 (1) of the UN Charter provides that:

> '[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, […]'

28 Article 52(1), (2) and (3) of the UN Charter.

29 Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, Report of the Secretary General, A/47/277 – S/24111, 17 June 1992, para. 63.

30 See for example, the Report of the Panel on United Nations Peace Operations to the UN General Assembly and the UN Security Council, A/55/305-S/2000/809, 21 August 2000, para. 54. See more recently, the Report of the High-level Independent Panel on Peace Operations on Uniting Our Strengths for Peace: Politics, Partnership and People, A/70/95-S/2015/446, (HIPPO Report), which devotes significant attention to AU-UNSC relationship.

31 Article 25 of the UN Charter.

32 See Erika de Wet, *The Chapter VII Powers of the UN Security Council* (Portland: Hart Publishing 2004), 294.

Thus, regional organisations may not undertake enforcement action unless authorised by the UNSC. Article 53 is a clear departure from the approach outlined in Article 52 and it centralises control of the use of force in the hands of the UNSC.[33] However, practice of the Economic Community of West African States (ECOWAS) and NATO in the 1990 s raised questions about the contemporary interpretation and application of Article 53(1) and whether post-1945 practice have modified this rule.[34]

On 24 December 1989, civil war broke out in Liberia which was characterised by unimaginable mass atrocities. The conflict did not receive prompt attention from the UNSC and on 23 August 1990, ECOWAS launched a military intervention to try and stop the conflict without seeking UNSC authorisation.[35] The UNSC subsequently adopted resolution 788 under Chapter VII in which it 'commended' ECOWAS' efforts to restore peace to Liberia even though the Council did not expressly authorise nor mention ECOWAS' unauthorised use of force.[36] Some authors argue that the UNSC's attitude to ECOWAS' use of force implies subsequent authorisation.[37] Similarly, in May 1997, the democratically elected government of Ahmed Tejan Kabbah of Sierra Leone was overthrown in a military coup derailing the fragile peace in the country. On 6 February 1998, ECOWAS launched a military intervention without seeking prior UNSC authorisation to restore the legitimate government.[38] The legality of this intervention is also debated but just like in Liberia, the UNSC subsequently adopted a number of resolutions in which it commended ECOWAS' efforts to restore peace in Sierra

33 De Wet (n. 32), 294.

34 Akande and Johnston (n. 1), 686; and Tiyanjana Maluwa, 'African States Practice and the Formation of Some Peremptory Norms of General International Law' in: Dire Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Leiden: Brill Njhoff 2021), 259-301 (298-299) reject the arguments advanced by Paliwal and Levitt that a regional customary law that permits enforcement action without UNSC authorisation have developed in Africa. See Suyash Paliwal, 'The Primacy of Regional Organisations in International Peacekeeping: The African Example', Va. J. Int'l L. 51 (2010), 185-230 (220-221); Jeremy Levitt 'Humanitarian Intervention by Regional Actors: The Case of ECOWAS in Liberia and Sierra Leone', Temp. Int'l & Comp. L. J. 12 (1998), 333-375; (347); Levitt, Intervention in Africa (n. 11), 795, 893, 818-823.

35 A detailed account of the events is recorded in Marc Weller, *Regional Peace-Keeping and International Enforcement: The Liberian Crisis* (Cambridge: Cambridge University Press 1994).

36 See SC Res. 788, 2, UN Doc. S/RES/788 of 19 November 1992, (Liberia). This resolution was followed by several similar resolutions commending ECOWAS.

37 See Levitt, Humanitarian Intervention (n. 34), 347.

38 See Thomas M. Franck, *Recourse to Force: State Response against Threats and Armed Attacks* (Cambridge: Cambridge University Press 2002), 159-162; Lee F. Berger, 'State Practice Evidence of the Humanitarian Intervention Coctrine: the ECOWAS Intervention in Sierra Leone', Ind. Int'l & Comp. L. Rev. 11 (2001), 605-632.

Leone.[39] This prompted some commentators to suggest that by commending rather than condemning ECOWAS, the UNSC authorised ECOWAS' use of force ex post facto.[40] Outside Africa, NATO's intervention in Kosovo in 1999 without UNSC authorisation is another example where non-condemnation of unauthorised use of force by a regional organisation has been interpreted by some commentators as 'implicit but certain authorization'.[41] Other commentators reject this view arguing that subsequent commendations do not constitute authorisation especially where the UNSC adopts a Chapter VII resolution yet stops short of explicitly authorising the use of force as was the case in both Liberia and Sierra Leone, because if it wanted to approve ECOWAS' use of force, it would have done so explicitly.[42] Accordingly, any military use of force by regional organisations require explicit UNSC authorisation except if such use of force is in exercise of the right of individual or collective self-defence under Article 51 of the Charter, or if it is based on the consent of the target state.[43]

However, some authors contend that subsequent state practice has reinterpreted the rule in Article 53(1) to allow regional organisations to undertake enforcement action without prior UNSC authorisation.[44] This view was put by Thomas Franck thus:

> 'The ECOWAS intervention in Liberia and Sierra Leone can be said to have demonstrated the reticent UN system's increasing propensity to let regional organizations use force, even absent prior Security Council authorization, when that seemed the only way to respond to impending humanitarian disasters. While both interventions were eventually ratified and adopted by the Council – first in the form of resolutions "commending" them, and then by decisions making the United Nations a partner in those operations – such *ex post facto approval effectively*

39 See for example, S/RES/1181 of 13 June 1998.

40 Franck (n. 38), 162.

41 Ugo Villani, 'The Security Council's Authorisation of Enforcement Action by Regional Organisations', Max Planck UNYB 6 (2002), 535-557 (543).

42 Monica Hakimi, 'To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization', Vand. J. Transnat'l L. 40 (2007), 643-685 (671); Karsten Nowrot and Emily W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', Am. U. Int'l L. Rev. 14 (1998), 312-412 (364-365).

43 Scharf (n. 17); Michael P. Scharf, 'How the War Against ISIS Changed International Law', Case W. Res. J. Int'l L. 48 (2016), 1-54; Mary E. O'Connell, 'The Popular but Unlawful Armed Reprisal' Ohio Northern University Law Review 44 (2018), 325-350 (346); Erika De Wet, 'The Relationship between the Security Council and Regional Organizations During Enforcement Action under Chapter VII of the United Nations Charter', NJIL 71 (2002), 1-37 (15); Kleczkowska (n. 1), 12.

44 Paliwal (n. 34), 221-222; Levitt (n. 34), 347, 818-823 (arguing that the interventions by African regional organisations are evidence of a change in the jus ad bellum).

reinterprets the text of Article 53. That reinterpretation is further evident in the Council's response to civil conflict in the Central African Republic and Kosovo.'[45]

There is no consensus view among commentators on this issue but the middle ground taken by some authors is to examine the response of the UNSC to each regional organisation's use of force. As illustrated by the cases referred to above, this approach created the notion of *ex-post facto ratification*.[46] According to this view, whether the UNSC commends or condemns an unauthorised use of force by a regional organisation could legitimise or delegitimise such action.[47] It is outside the scope of this paper to consider the merits or otherwise of this view save to say that the question of UNSC authorisation was further complicated by the AU's adoption of Article 4(h) and the emergence of R2P. The AU articulated its position on this issue in the 2005 Ezulwini Consensus thus:

'(i) The African Union agrees with the Panel that the intervention of Regional Organisations 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*. […]

(ii) With regard to the use of force, it is important to comply scrupulously with the provisions of Article 51 of the UN Charter, which authorise the use of force only in cases of legitimate self-defence. *In addition*, *the Constitutive Act of the African Union, in its Article 4(h), authorises intervention in grave circumstances such as genocide, war crimes and crimes against humanity. Consequently, any recourse to force outside the framework of Article 51 of the UN Charter and Article 4 (h) of the AU Constitutive Act, should be prohibited.*'[48]

Commenting on the import of the above paragraphs, Abass notes that '[i]n 2005,the AU, in its Ezulwini Consensus, […] asserted that it has the right to take enforcement action in respect of a Member State without the Security Council's authorisation.'[49] From the above, it follows that intervention by the AU should, first and foremost, be authorised by the UNSC. However,

45 Franck (n. 38), 162.

46 De Wet (n. 13), 86.

47 See Levitt (n. 34); a view rejected by Monica Hakimi, 'The Jus ad Bellum's Regulatory Form', AJIL 112 (2018), 151-190 (166); Hakimi (n. 42), 666-672; and more recently by Heller (n. 1), 625-626, 630-632.

48 Ezulwini Consensus, AU Executive Council, Doc. Ext/EX.CL/2 (VII), 6 (emphasis added).

49 Ademola Abass, 'Calibrating the Conceptual Contours of Article 4(h)' in: Dan Kuwali and Frans Viljoen (eds), *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (London: Routledge 2014), 38-53 (40).

the AU also maintains that there would be exceptions where authorisation could be obtained 'after the fact' which implicitly supports the *ex post facto* ratification proposal of some commentators. In fact, it is possible to argue that the AU construes Article 4(h) as an 'exceptional norm variance' provision that allows it to act in exceptional circumstances notwithstanding Article 2(4) and 53(1) of the Charter.[50] Nonetheless, there seems to have been a shift in the weight of opinion in favour of Erika de Wet's position that

> '[a]rguments that regional organizations would have a residual power to adopt military measures where the Security Council fails to act in situations of gross and systematic human rights violations, would undermine the notion of centralized use of force that is inherent to the Charter'.[51]

It is pertinent to mention just two objections in this regard. The above view seems to assume that the UN Charter functions the way it was intended back in 1945. Secondly, the view ignores the pitfalls in elevating formalism over human security considerations especially in an undemocratic body like the UNSC. In situations where the UNSC itself is paralysed by a veto and blocks a regional organisation most affected by the crisis and whose peoples may not even be represented at the UNSC at the time from acting, it will be stretching formalism too far to argue that enforcement action by such region cannot be contemplated.[52] Certainly, the UN Charter is not a 'suicide Pact'.[53]

The above two-layered approach to the relationship between regional organisations and the UNSC in the Charter may have addressed some of the concerns raised by states in 1945, many of the challenges of international peace and security confronting the UN today arise from circumstances not foreseen in 1945 and the AU's use of force norms and its potential impact on AU-UNSC relationship demonstrates this reality. In the next section, I examine how AU's norm-making on the use of force constitutes norm contestation in its relationship with the UNSC. I draw on Amitav Acharya's work on norm 'localisation' and norm 'subsidiarity' to frame the tension in AU-UNSC relationship as norm contestation.

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50 I am grateful to the anonymous reviewer for this idea.

51 De Wet (n. 43); see Maluwa (n. 34), 297; Hakimi, Jus ad Bellum (n. 47), 167-178.

52 This view is implied in two major reports. A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, para. 272; ICISS Report, para 6.37. Although it is not reflected in the WSOD; Report of the African Union-United Nations Panel on Modalities for Support to African Union Peacekeeping Operations, (Prodi Report) A/63/666-S/2008/813, paras 63-65.

53 See Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy Oriented Perspective* (Oxford: Oxford University Press 2015), 382, 384.

III. Norm Contestation in AU-UNSC Relationship with Respect to the Use of Force

Contestation is an 'analytical concept' for understanding 'the diverse practices by which actors – usually the supposed recipients or followers of the norms in question – dispute the validity, the meaning, or the application of norms'.[54] It is the 'discursive and behavioural challenges to the application, meaning, and validity of international norms as well as the broader normative system'.[55] Contestation is interactive and involves a minimum of two agents showing dissatisfaction with any particular norm in a variety of ways.[56] In his study of regional norm dynamics in the Association of South East Asian Nations, Acharya develops 'norm localisation' and 'norm subsidiarity'[57] to characterise processes and consequences of norm contestation 'beyond full norm adoption or mere rejection'.[58] This International Relations (IR) theoretical approach can shed light on the international law implications of the normative tensions between Article 4(h) and some UN Charter norms.

1. Localisation in AU-UNSC Relationship: An Adaptive Contestation?

The idea of norm localisation refers to the process of making external norms compatible with local (or for our purposes, regional) 'cognitive prior'.[59] It is 'the active construction through discourse, framing, grafting, and cultural selection of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices'.[60] This transmission of ideas could begin with a

> 'reinterpretation and re-representation of the outside norm, including framing and grafting, but may extend into more complex processes of reconstitution to make an outside norm congruent with a preexisting local normative order. It is also

54 Jonas Wolff and Lisbeth Zimmermann, 'Between Banyans and Battle Scenes', Rev. Int'l Stud. 42 (2016), 513-534 (518).

55 See Lesch and Marxsen (n. 27).

56 Lesch and Marxsen (n. 27) discuss different types of contestations.

57 Amitav Acharya, 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World', International Studies Quarterly 55 (2011), 95-123.

58 See Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism', IO 58 (2004), 239-275; Wolff and Zimmermann (n. 54).

59 Acharya (n. 57), 98.

60 Acharya (n. 58), 245.

a process in which the role of local actors is more crucial than that of outside actors'.[61]

In outlining the characteristics of norm localisation, Acharya posits that regional actors as norm takers are not mere passive norm-recipients, but active agents who demonstrate 'the idea of the local initiative', by localising foreign norms 'through indigenous initiative and adaptation'.[62] The local actors make necessary adjustments to the form and substance of the foreign norm in order to fit the 'prior beliefs and practices' of local actors and they are able to contest, modify, or adapt the foreign norm to local circumstances.[63] External norms are only incorporated into regional domain for application by these actors who accept these external norms as beneficial and necessary but incompatible with their 'cognitive prior' in some respects and therefore need a re-characterisation.[64] This process may require institutional adjustments as well but it does enhance the authority and legitimacy of regional actors.[65] According to Acharya, '[n]orm localization, or the process of adapting global norms to local ideas, identities, and practices […] occurs any time a global norm intersects with local/regional ideas/identities/practices […]'[66] The process takes place in virtually all cases where regional actors have to rationalise universal norms before domestic constituencies and does not depend on a feeling of 'exclusion or a perception of big power hypocrisy, or perception of dominance, neglect, violation, or abuse. The latter are the triggers of norm subsidiarity, and they are more likely to be found among smaller, weaker, and peripheral actors.'[67] Below, I explain how this plays out in AU-UNSC relationship in terms of the use of force norm. As indicated above, I identify two sites of such inconsistencies.

First, Article 2(4) of the UN Charter prohibits the use of force by States and this norm is widely accepted as a peremptory global norm (jus cogens) from which no State may derogate.[68] The AU also accepts this broad normative prescript and it is incorporated in Article 4(f) of the AU Constitutive Act which prohibits the use of force by AU member States *inter se*. However, the AU goes a step further in its localisation of jus ad bellum norm in Article 4(h)

61 Acharya (n. 58), 244.

62 Acharya (n. 58), 245.

63 Acharya (n. 58), 246. I am grateful to Christian Marxsen and Max Lesch for drawing my attention to the importance of this point to Acharya's concept of localisation.

64 Acharya (n. 57), 99.

65 Acharya (n. 58), 245.

66 Acharya (n. 57), 99.

67 Acharya (n. 57), 98-99.

68 See Articles 53 and 64 of the Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969 and entered into force on 27 January 1980, U. N. T. S. 1155, 331. However, see n. 82.

by recognising the right of the AU to use force on three additional grounds: '[…] *in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity*'.[69] This provision is not only inconsistent with Article 2(4) of the UN Charter but the regulation of the use of force paradigm which only recognises two grounds for the use of force – the right to individual and collective self-defence under Article 51 and cases of UNSC authorised use of force under Chapter VII. Even if one questions whether the norm in Article 2(4) is indeed a foreign norm, it has to be admitted that AU's adoption of Article 4(h) illustrates the point made by Acharya that there has been a 'tendency among Third World societies to question existing international norms and develop new ones, including […] subsidiary norms that redefine the meaning and scope of the preexisting European-derived global norms to reflect Third World conditions.'[70] Given Africa's past experiences, the AU had to adapt the prohibition of the use of force norm to its regional context to address the challenge of external intervention to prevent mass atrocities in internal conflicts in Africa. In this sense, the AU's normative practice can be explained by the concept of norm localisation. There are many other international legal norms also enshrined in the AU Constitutive Act including the principle of sovereignty,[71] recognition of colonial boundaries,[72] the peaceful settlement of disputes,[73] non-interference in the internal affairs of member states.[74] The AU predecessor, the OAU, had a long history of mobilising support for the above principles as important global norms many of which also underpin the AU Constitutive Act.[75] The AU's adoption of the norm in Article 4(h) attracted its proponents and critics and it is imperative to consider a few of those objections here.

Some of the early analyses treat the norm in Article 4(h) as a right of military intervention by invitation. The crux of this approach is that AU member States are free to consent to a valid treaty under international law in exercise of their sovereignty as independent States.[76] Therefore, the use of force by the AU that would violate Article 2(4) of the Charter or require

69 Emphasis mine. Article 4(j) also provides for 'the right of Member States to request intervention from the Union in order to restore peace and security'.

70 Acharya (n. 57), 100.

71 Article 4(a) of the AU Constitutive Act.

72 Article 4(b) of the AU Constitutive Act.

73 Article 4(e) of the AU Constitutive Act.

74 Article 4(g) of the AU Constitutive Act; see Article 2(7) of the UN Charter.

75 See for example, the GA Resolution on Aggression, GA Res 2625 (XXV) on Friendly Relations; GA Res 2131 (XX) on Inadmissibility of Intervention; GA Res 3314 (XXIX) on the Definition of Aggression.

76 See Dan Kuwali, 'Persuasive Prevention: Towards a Principle for Implementing Article 4 (h) and R2P by the African Union', Nordic African Institute 42 (2009), 1-70 (17).

UNSC authorisation under Article 53(1) is only the use of force against the territorial integrity and political independence of such member State and it does not apply to situations where regional groupings come together by way of treaty arrangement to protect certain values and agree to defend those values by use of military force if necessary.[77] Supporters of this view rely on the doctrine of *volenti non fit injuria* and it is argued that Article 4(h) constitutes what Buchanan and Keohane have described as a pre-commitment regime whose legal effect is to suspend the legal rule otherwise regulating the relationship between the AU and member states and thus, precluding the wrongfulness of the AU's use of force.[78] The same logic underlies the position taken by Ademola Abass who argues that Article 4(h) could be explained as *consensual intervention* based on the prior consent given by the target State in the AU Constitutive Act.[79] The implication of this is that Article 4(h) intervention would in fact not constitute an 'enforcement action' at all, but would rather be more akin to traditional peacekeeping and would thus fall outside both Article 2(4) and 53(1).[80]

However, some other authors reject the above view contending that in all cases where the AU acts on the basis of Article 4(h), it must obtain the contemporaneous consent of the target State or seek UNSC authorisation.[81] The critics insist that because of the peremptory character of the norm in Article 2(4) of the UN Charter, no state can contract out of it by consent expressed in a treaty arrangement.[82] In my view, there are good reasons for supporting Abass's argument especially in view of the legal effect of consent in law.[83] This view also finds support in the historical origin of Article 4(h) supported by the practice of a sub-regional group like ECOWAS. It is also consistent with a teleological interpretation of the Constitutive Act. Moreover, the same logic of consent can be used to resolve the conflict between

77 See Article 20 of the Articles on the Responsibility of States for Internationally Wrongful Act, Report of the International Law Commission to the General Assembly on the Work of Its Fifty-Third Session 2001, Yearbook of International Law Commission, Vol. II, 2001, A/CN.4/SER.A/2001/Add.1 (Part 2).

78 Allen Buchanan and Robert O. Keohane, 'Precommitment Regimes for Intervention: Supplementing the Security Council', Ethics & International Affairs 25 (2011), 41-63 (45).

79 Buchanan and Keohane (n. 78), 45, who strongly advocate this approach.

80 Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis', ICLQ 53 (2004), 211-225 (224).

81 David Wippman, 'Treaty-Based Intervention: Who Can Say No?', U. Chi. L. Rev. 62 (1995), 607-687 (620).

82 See Article 53 of the Vienna Convention on the Law of Treaties (1969), U. N. T. S. 1155, 331.

83 ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of The Congo v. Uganda), judgment of 19 December 2005, ICJ Reports 2005, 168, paras 45, 47, 54, 105, 149.

the AU's *right to intervene in Member States* under Article 4(h) and the question of the peremptory character of the norm in Article 2(4) of the UN Charter. Although she questions the attempt to circumvent the prohibition on the use of force generally, Federica Paddeu sums up the far-reaching legal effect of the consent argument neatly in a horizontal legal order like international law:

> 'Consent, it is said, 'turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography'. The same holds true in international law. Thus, the consent of the territorial state turns an intervention into aid, and an exercise of extraterritorial jurisdiction into cooperation. Consent renders lawful that which would otherwise be unlawful. This is the 'legal magic' of consent, to paraphrase moral philosopher Heidi Hurd. It is consent, too, that turns an otherwise prohibited use of force into a permissible one. Indeed, while the use of force is prohibited in international law, it is unanimously agreed that consensual force – albeit within certain limits – is permitted.[84]

It is acknowledged that the major objection raised by scholars that the norm in Article 2(4) of the UN Charter is non-derogable remains a formidable test for Article 4(h).[85] However, the exact character of the jus cogens norm in Article 2(4) and how it changes has sometimes been questioned too.[86] For some, the idea of Article 2(4) as a supernorm have often been exaggerated and its non-derogability as a jus cogens uncritically accepted by many.[87] These critics point to the several instances of accepted derogation from jus cogens norm to suggest that, the notion of non-derogability is itself a contradiction in terms.[88] Thus, as Lesch and Marxsen demonstrate in their Introduction to this Symposium, there is ongoing norm contestation about the meaning, scope, and validity of the use of force norm in Article 2(4) its peremptory character notwithstanding.

For purposes of our analysis, it is possible to explain Article 4(h) derogating from Article 2(4) as norm localisation. First, the AU accepts the peremp-

84 Federica Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force', Journal on the Use of Force and International Law 7 (2020), 227-269.

85 Akande and Johnston (n. 1).

86 Katie A. Johnston, 'Identifying the Jus Cogens Norm in The Jus Ad Bellum', ICLQ 70 (2021), 29-7 (32, 33); James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', Mich. J. Int'l L. 32 (2011), 215-257; Matthew Saul, 'Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges', Asian Journal of International Law 5 (2015), 26-54 (26, 41).

87 Green (n. 86), 217, 235.

88 Green (n. 86), 236.

tory character of the ban on the use of force as a fundamental principle of international law and it frequently reiterates its commitment to this norm as the cornerstone of the UN Charter. However, at the regional level, the AU has re-defined the norm, its scope and application in the African regional legal order in a way that recognises a differentiated or 'exceptional norm variance' approach to its understanding of the use of force to collectively address certain continental challenges based on regional treaty arrangements.[89] Any subsequent intervention based on such treaty arrangements will derive its validity from the consent of the target state expressed in the treaty. Understood in this way, it is the absence of consent that makes the use of force a violation of the peremptory norm in Article 2(4) in the first place and therefore could render it inconsistent with a jus cogens.[90] This nuanced distinction is seldom drawn in many commentaries on Article 4(h) and how it impacts AU-UNSC relationship under the UN Charter.

2. Subsidiarity in AU-UNSC Relationship: A Systemic Contestation?

The idea of norm subsidiarity can be used to explain the reasons and ways in which AU members create norms that regulate their relationships inter se and their relationship to external actors like the UNSC. According to Acharya, norm subsidiarity refers to a 'process whereby local actors create rules with a view to preserve their autonomy from dominance, neglect, violation, or abuse by more powerful central actors'.[91] In this process 'local actors develop new rules, offer new understandings of global rules or reaffirm global rules in the regional context'.[92] Under subsidiarity, regional actors constitute norm makers capable of rejecting foreign norms and exporting locally developed norms to the global levels to either 'universalize' such local norms or in some way as reinforcement of existing universal norms opposed to the narrow ideas of powerful states.[93] Here, the power relations between regional actors and powerful external actors and the constant apprehension of domination by powerful actors occupy a central place in policy formula-

89 I owe this point to the anonymous reviewer of this article. See also Jean Allain, 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union', Max Planck UNYB 8 (2004), 237-289 (284).

90 Abass (n. 80), 224.

91 Acharya (n. 57), 95.

92 Acharya (n. 57), 101.

93 Acharya (n. 57), 99.

tion and behaviour.[94] As a result, under norm subsidiarity, there is a tendency for regional actors to reject external ideas emanating from powerful and dominant outside actors which they do not consider as valuable and worthy of acceptance and incorporation into local contexts.[95] Compared to norm localisation discussed in the preceding section, Acharya argues that whereas norm localisation is 'inward-looking', norm subsidiarity is 'outward-looking'.[96] Yet, it is important to note that norm subsidiarity and norm localisation do not operate in a mutually exclusive manner and Acharya does point out that notwithstanding their different manifestations, both are in fact complementary and actors could adopt both approaches to the same issue in a variety of contexts.[97] We observe this approach in AU's response to certain global norms and its engagement with the UNSC and international law more generally. Most African States were still under colonial domination when the UN Charter that undergirds the current global normative order was drafted in 1945. Except for the inputs of a handful of Arab and Latin American States, the concerns of the Third World were marginal to the process.[98] This historical background, the unrepresentative and undemocratic composition of the UNSC, the failure to reform the UNSC, and a host of other factors set the context in which AU norm contestatory behaviour developed. It is within this context that the *raison d'etre* for Article 4(h) and the AU's relationship with the UNSC on the use of force could be explained by norm subsidiarity.

The norm subsidiarity we see in AU practice vis-à-vis the UN Charter arise from aspects of the norm in Article 4(h) which creates 'the right of the Union to intervene in a Member State *pursuant to a decision of the Assembly*

94 Acharya (n. 57), 99.

95 Acharya (n. 57), 99.

96 Acharya (n. 57), 99.

97 Acharya notes that 'Subsidiarity and localization can be complimentary, [and] […] There is no reason why actors cannot engage in both types of normative behavior. In fact, the creation of a single norm may involve both processes, whereby a global norm is redefined while a local norm is infused into a global common. Third World countries often do both. Together, they offer a comprehensive framework understanding and explaining norm dynamics and diffusion in world politics. Hence, both processes have been at work in the Third World.' Acharya (n. 57), 99 footnote 15.

98 Chen Yifeng, 'Bandung, China, and the Making of World Order in East Asia' in: Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press 2017), 177-195 (188); Luis Eslava, Michael Fakhri and Vasuki Nesiah, 'The Spirit of Bandung' in: Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press 2017), 3-32 (4); Liliana Obregón 'Latin America during the Bandung Era: Anti-Imperialist Movements vs. Anti-Communist States' in: Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press 2017), 232-246 (234).

[…]'. A combined reading of Article 4(h), and Articles 16(1) and 17(1) of the AUPSC Protocol reveals that the authority to decide when the AU may undertake enforcement action under Article 4(h) is vested in the AU's Assembly of Heads of States and Government which is its highest decision-making organ, rather than the UNSC as required by Article 53(1) of the UN Charter.[99] This tension between key norms in the AU Peace and Security Architecture and the UN Charter collective security system play out in AU-UNSC relationship and raise three questions from an African perspective: (i) what is the scope of the prohibition on the use of force? (ii) for what purposes may force be lawfully used? and (iii), who can and should authorise such use of force? These questions do not lend themselves to easy answers and have been described differently in the literature. The first two questions have been addressed above. Some authors view the third question as a direct challenge to the primacy of the UNSC in the maintenance of international peace and security.[100] Others have explained it as an attempt at redistribution of authority in global governance.[101] Yet, others have described it as arenas of normative conflict and ambiguities or an attempt to break UNSC monopoly on the use of force.[102] Here, I will frame the third question of UNSC authorisation of AU enforcement action as an issue of norm subsidiarity by AU regional actors which challenges the UN Charter-based system of collective security. By framing the question this way, the theoretical insights gained provides an explanation or at least, offer a deeper understanding of the effect of AU norm contestation on AU-UNSC relationship.

As pointed out above, Article 2(4) of the UN Charter prohibits the use of force by States and this norm is widely agreed to be a peremptory norm (*jus cogens*) from which no State may derogate. However, Article 4(h) of the AU Constitutive Act provides for '*the right of the Union to intervene in a Member State pursuant to a decision of the Assembly* in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. Many commentaries take a general interpretation of the import of Article 4 (h) as a whole but only few actually try to deconstruct it. The *right of the Union to intervene in a Member State* actually derives from the expression of the collective will of AU Member States by which each ratifying state limits its own sovereignty by accepting the possibility of a future AU intervention in its territory. Some authors have presented a variant of this argument by

99 See Articles 16(1) and 17(1) AUPSC Protocol.

100 Allain (n. 89), 238.

101 See Zsuzsanna Deen Racsmany, 'A Redistribution of Authority Between the UN and Regional Organisations in the Field of Maintenance of Peace and Security', LJIL 13 (2000), 297-231.

102 Iyi (n. 11).

contending that an Article 4(h) intervention requires even if not prior consent but the contemporaneous consent of the target AU member State except if approved by the UNSC.[103] I have already addressed this argument in the preceding section in so far as it relates to consent. Here, to the extent that the proposition relates to the necessity of UNSC approval in all situations baring contemporaneous consent, I will present three arguments whose basic premise I take to be the norm subsidiarity practice of the African Union.

First, the argument for UNSC approval defeats the very purpose of Article 4(h) – to have a legal basis of enforcement action by the AU to prevent or halt mass atrocities where, in all likelihood, the perpetrator is the territorial State and unlikely to consent to external intervention. Secondly, the argument for UNSC authorisation is antithetical to the very idea of '*the right*' of the Union to intervene as contemplated in Article 4(h).[104] Thirdly, the argument that consent of the target state or UNSC authorisation is a requirement in Article 4(h) enforcement action diminishes the legal character and purpose of Article 4(h) to just another legal device for peacekeeping operations because its efficacy is then contingent not on the AU but on the target state or the UNSC, which arguably is not what Article 4(h) was designed to be. Finally, the UNSC approval argument is inconsistent with the historical origin and rationale for Article 4(h). Against the backdrop of several conflict-related mass atrocities in Africa, particularly the Rwandan genocide and the inadequate response of the UNSC to these atrocities, the AU resorted to norm subsidiary by adopting Article 4(h) seeking to reclaim autonomy in the use of force in its response to a specific African problem.[105] This legal challenge, signalling AU contestation of UNSC primacy in the use of force was in fact canvassed during the drafting process of Article 4(h) but was 'dismissed out of hand'[106]. The history of Article 4(h) is instructive here.

The defunct OAU had set up the International Panel of Eminent Personalities (IPEP) with a mandate to investigate the immediate and remote causes of the Rwandan genocide and make recommendations to the organisation on how to avert a recurrence.[107] In its report, the Panel recommended that:

> 'Since Africa recognises its own primary responsibility to protect the lives of its citizens, we call on:

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103 Kleczkowska (n. 1), 17.

104 Ben Kioko 'The Right of Intervention Under the African Union's Constitutive Act: From Non-Interference to Non-Intervention', Int' l Rev. of the Red Cross 85 (2003), 807-825 (815).

105 Allain (n. 89), 288.

106 Kioko (n. 104), 821.

107 Rwanda: The Preventable Genocide, International Panel of Eminent Personalities Report on the Genocide in Rwanda, July 2000, chapter 21, para. 12.

(a) the OAU to establish appropriate structures to enable it to respond effectively to enforce the peace in conflict situations; and

(b) the international community to assist such endeavours by the OAU through financial, logistic, and capacity support'[108]

This historical context explains the AU's contestatory norm practice in its claim of *primary responsibility* to protect the lives of Africans which we find in Article 4(h) and the AU's claim of regional autonomy by assuming primary responsibility for the maintenance of peace and security on the continent.[109] One other argument often put forward by critics of Article 4(h) and how it impacts AU-UNSC relationship is that even if all else fails, AU member states will be caught by their obligations under the supremacy clause in Article 103 of the UN Charter and regional practice cannot change that. Dapo Akande argues that norm practice by states is of limited effect in bringing about change in the UN Charter norms in this regard which can only be modified by its formal procedures laid out in the Charter.[110] While this is a valid proposition, it still flies in the face of evidence – it is either one proposes to discount all incidence of norm-breaking as mere violations, or one will have to accept that the practice of regional organisations like ECOWAS regardless of its apparent deviation from existing interpretation of Article 53(1) in respect of the AU's relationship with the UNSC is evidence of the regional norm now codified in Article 4(h). As a subsidiary norm, Article 4(h) may well represent AU's contestation of the UN Charter-based normative order in respect of the use of force to prevent mass atrocities, but to the extent that it is a valid norm in Africa's regional legal order it is an important contribution that demonstrates the need to take seriously the norm practices of non-Western regional organisations because it may also influence further development at the international level.[111]

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108 See IPEP Report para. 22. See also Dan Kuwali, 'The End of Humanitarian Intervention: Evaluation of the African Union's Right of Intervention', African Journal of Conflict Resolution 9 (2012), 41-61 (4), expressing the OAU's remorse for its failures to act on its own in Rwanda to prevent the genocide.

109 Kioko (n. 104), 812-813.

110 Akande and Johnston (n. 1), 679, 686.

111 A recent controversial suggestion is the 23rd September 2019 Resolution of the Organ of Consultation of the Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security, signed at Rio de Janerio on 2 September 1947 and came into force on 3 December 1948, TIAR with respect to the situation in Venezuela (hereafter TIAR). See Felipe Rodríguez Silvestre and J. Francisco Lobo, ,The International Law on the Use of Force in light of new developments from the Americas, EJIL: Talk!, 17 February 2020, < https://www.ejiltalk.org/the-international-law-on-the-use-of-force-in-light-of-new-developments-from-the-americas/>.

IV. The Effects of Norm Contestations on AU-UNSC Relationship

The norm contestations discussed above have impacted the norm on the use of force and AU-UNSC relationship in a variety of ways and I will briefly examine some of them below. The AU has used the creation of subsidiary norms to both resist the continued domination of Africa through the UNSC as well as to support some universal norms enshrined in the UN Charter. Hence the AU argues that while Article 4(h) provides for the AU's right of intervention on the listed grounds, it insists that any other use of force must comply with the UN Charter.[112] So, what has been the effect? This can be gleaned from how AU-UNSC relationship has evolved since the adoption of Article 4(h).

First, the AU's norm localisation and norm subsidiarity approach has arguably created upsets and tensions – while also presenting opportunities and challenges for the AU and UNSC to move towards a new understanding of the scope of Article 53(1) and how it is to be interpreted and applied in practice. We have seen the flexibility for adapting the Charter provisions in this regard in respect of new AU-UN partnership arrangements. As Thomas Tieku puts it '[t]he power- and burden-sharing arrangement between the AU and the UN goes beyond the UN Charter's paternalistic attitude to regional organizations'.[113] The norm contestation has arguably stimulated this momentum towards a new approach. As mentioned above, several UN reports have earlier hinted at the possibility of an interpretation of Article 53(1) permitting regional organisations to act where the UNSC is paralysed in the face of mass atrocities. In the absence of any tangible reform, it should not come as a surprise that regional actors react through norm subsidiarity as the AU has done even though this could result in norm erosion and undermine efforts to create a rules-based system.[114]

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112 Acharya (n. 57), 113.

113 Thomas K. Tieku, 'The African Union' in: Jane Boulden (ed.) *Responding to Conflict in Africa* (New York: Palgrave Macmillan 2013), 33-50 (33).

114 Matthias Dembinski, 'Procedural Justice and Global Order: Explaining African Reaction to the Application of Global Protection Norms', European Journal of International Relations 23 (2017), 809-832 (815), suggests that perception of procedural fairness in the processes of decision making of international organisations such as the UNSC determines how regional actors like the AU responds by either supporting or opposing such decision and he draws on the different response of the AU to the intervention in Libya and Cote d'Ivoire. The author argues that the extent to which African States viewed themselves as given 'voice opportunity' in the interpretation and implementation of global norms of R2P (Libya) and PoC (Ivory Coast) influenced why they rejected the overthrow of Gaddafi in Libya but more or less accepted the overthrow of Laurent Gbagbo in Cote d'Ivoire.

A second effect is what I will call norm conflation and ambiguity – the legal uncertainty now surrounding whether or not UNSC authorisation is mandatory for regional enforcement action. First, the idea of *ex-post facto ratification* has muddied rather than clarified the legal ambiguity now surrounding the interpretation of Article 53(1). This ambiguity is highlighted by the political unrest in Venezuela where some called for military intervention by the OAS and whether such intervention would require UNSC authorisation.[115] Paradoxically, this development has also produced a norm clarifying role in terms of regional peace and security. For example, when ECOWAS intervened in Liberia and Sierra Leone in the 1990 s, it had no legal basis in its constitutive instrument authorising such use of force. However, Article 4(h) has now settled that in respect of the AU even though the question of UNSC approval remains unclear presenting what has been described in this Symposium as *dormant contestation*.[116] This norm clarification strengthens regional international law in Africa even if not yet replicated in other regions. Finally, there is perhaps even a possibility that Article 4(h) could contribute to the development of a regional jus cogens on the use of force to prevent or halt mass atrocities.[117]

In practice, the AU and the UNSC seem to have reached some understanding on the use of force in Africa and whether or not UNSC prior authorisation is needed for AU enforcement action.[118] The 2017 AU-UN Partnership Document states that the AU and the UN framework for partnership and cooperation in matters of peace and security in Africa should be operationalised within Chapter VII of the UN Charter.[119] At the same time, the HIPPO Report while stressing the imperatives of UNSC authorisation of enforcement action by regional arrangements, apparently suggests that there could be circumstances where intervention is authorised by the AU rather than the UNSC – in which case the intervention would have to be funded by the AU and not the UNSC.[120] Thus, financial support seems to have become

115 Federica Paddeu, 'The Rio Treaty: Paving the Way for Military Intervention in Venezuela?', 19 October 2019, available at <https://www.justsecurity.org/66758/the-rio-treaty-paving-the-way-for-military-intervention-in-venezuela/>; Silvestre and Lobo (n. 111); TIAR (n. 111).

116 Lesch and Marxsen (n. 27).

117 See the Fourth Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur, 31 January 2019, A/CN.4/727; para. 21-ff. I thank Dire Tladi for drawing my attention to this development.

118 Maluwa (n. 34), 295-296.

119 The Joint United Nations-African Union Framework for Enhanced Partnership in Peace and Security, 19 April 2017, New York, available at <https://unoau.unmissions.org/sites/default/files/jount_un-au_framework_for_an_enhanced_partnership_in_peace_and_security.pdf>, 2.

120 The HIPPO Report (n. 30), paras 246-248.

the motive for seeking UNSC authorisation for AU enforcement action rather than any feeling of legal obligation arising from Article 53(1). Echoing similar views, Jeremy Sarkin notes,

> '[t]his suggests that the AU may at times go it alone without UN authorization, and may or may not subsequently have the HI [humanitarian intervention] ratified. The fact that no prior UN authorization is provided for, and that subsequent ratification may not be given, or requested, makes it clear that the AU sees the right, or possibility, for HI outside the UN Charter.'[121]

This conclusion seems supported by current AU-UNSC practice whereby the AU sometimes initiates a mission with the approval of the UNSC for speedy action and subsequently transfers such mission to the UN. It is however, remarkable that the AU has never invoked Article 4(h) even though there have been cases deserving of AU's intervention and as stated in the Ezulwini Consensus, it is more than likely that the AU will seek UNSC authorisation where possible but the real test will be where such authorisation is not forthcoming.[122]

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121 Jeremy Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect', J. A. L. 53 (2009), 1-33 (8).

122 The AUPSC invocation of Article 4(h) intervention regarding MAPROBU was not approved by the Assembly of Heads of State and Government. Some commentators question whether Article 4(h) will ever be used in practice. See International Crisis Group, The African Union and the Burundi Crisis: Ambition versus Reality, 28 September 2016, Briefing No. 122, available at <http://www.refworld.org/docid/57ebb6264.html> (accessed 25 September 2018); Ty McCormick, 'The Burundi Intervention that Wasn't', Foreign Policy, 2 February 2016, available at <https://foreignpolicy.com/2016/02/02/the-burundi-intervention-that-wasnt/>; accessed 20 December 2022. For a contrary view suggesting that such conclusion is a misunderstanding of the intended purpose of Article 4(h) see Solomon Dersso, 'To Intervene or Not to Intervene? An Inside View of the AU's Decision-Making on Article 4(h) and Burundi', World Peace Foundation, February 2016, African Union, 2005. Roadmap for the Operationalisation of the African Standby Force, Experts' Meeting on the Relationship between the AU and the Regional Mechanisms for Conflict Prevention, Management and Resolution, Addis Ababa, 22-23 March 2005, EXP/AU-RECS/ASF/4(I). It is noteworthy that paragraph 10 of this document requests UNSC to adopt a resolution in 'support' rather than to 'authorise' the invocation of Article 4(h). It is also noteworthy that the AUPSC Communique was issued after it invoked Article 4(h) and not before. At best, what comes out is the 'complicated by ambiguity over the principle of subsidiarity' between the AU and the UNSC and African RECs. See Henni Strydom, 'The Evolution of the UN-AU Peace and Security Partnership' in: Frans Viljoen, Charles Fombad, Dire Tladi, Ann Skelton and Magnus Killander (eds), *A Life Interrupted: Essays in Honour of the Lives and Legacies of Christof Heyns* (Pretoria: Pretoria University Law Press 2022), 222-251 (237). See also Maluwa (n. 7), 391-393 (discussing four situations in which the AU could have invoked Article 4(h) as justification to intervene but did not do so).

V. Conclusion

In this article, I have examined how the concepts of norm localisation and norm subsidiarity can explain two instances of norm contestation in the norm practices of the African Union. The first contestation is seen in the conflict between the norms in Article 2(4) of the UN Charter and Article 4(h) of the AU Constitutive Act. Article 4(h) contradicts the basic jus ad bellum norm in a fundamental sense and the wording of Article 4(h) challenges our normative understandings of the purposes force may be used when applied in the African regional context as opposed to the UN Charter and general international law paradigm. The AU localisation of the jus ad bellum norm is a norm contestation practice to the extent that it creates extra-Charter paradigm in which force may be lawfully used by a regional organisation. We see the second instance when the AU vests the right to authorise the use of force under the AU's normative framework in the African Union Assembly of Heads of State and Government (AU-AHSG) rather than the UNSC. This arrangement creates a new level of authority that questions the authority of the UNSC to approve enforcement action by the AU in terms of Article 53 (1) of the UN Charter. When situated in the context of the legal framework of the AU Peace and Security Architecture, this contestatory norm-making practice poses a fundamental challenge to the UN Charter collective security arrangement.

The basis of AU's contestatory behaviour arguably derives from the fact that the AU questions the legitimacy of the UNSC and certain international norms and the contradictions that underpin the UNSC's authority and practices of the use of force under the UN Charter.[123] The AU has arguably learnt to adapt to some sets of these Western value-based norms while simultaneously challenging and either rejecting others outrightly or reinventing them.[124] As Acharya puts it, 'even in their adaptive role, there has been a tendency among Third World societies to question existing international norms and develop new ones, including what I call subsidiary norms that redefine the meaning and scope of the preexisting European-derived global norms to reflect Third World conditions'.[125] Given the colonial origin of international law and the legacy of international law's complicity in the oppression and continued marginalisation of Africa and other Third World peoples, the AU appears to resist certain UN Charter-based legal norms and the normative domination agenda they represent or

123 Sarkin (n. 121), 19.
124 Acharya (n. 57), 99-100.
125 Acharya (n. 57), 100.

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serve.[126] As far as this continues to mirror the reality of the African condition, the AU apparently felt compelled to develop norm contestation strategies both to address challenges considered peculiar to Africa and simultaneously respond to the normative agenda of dominant global powers. It is in this sense one could think of Article 4(h) of the AU Constitutive Act as constituting a norm contestation posed by the African regional legal order to the international law on the use of force under the UN Charter.

126 Kioko (n. 104), 821, stating that Article 4(h) was borne out of AU's frustrations with lack of reforms at the UN, especially the UNSC.