

THE PRIMACY OF REGIONAL ORGANIZATIONS IN INTERNATIONAL PEACEKEEPING:  
THE AFRICAN EXAMPLE

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*Abstract*

*The United Nations Charter enshrines the primacy of regional arrangements or agencies over pacific dispute settlement for the maintenance of international peace and security consistent with the Principles and Purposes of the United Nations. But in the recent decades, regional organizations, rather than the UN Security Council, have also taken a first-instance role in peacekeeping involving the use of force, a development not foreseen under the Charter. Political realities among the Security Council's permanent members, their sometimes conflicting interests, and Council inaction due to the veto have prompted regional organizations to undertake their own enforcement actions to address threats to regional peace, security, and stability. The regional organizations on the African continent have led the charge in this development. This Note first reviews the legal issues raised by these actions in relation to the UN Charter framework, followed by an appraisal of the practice of Africa's prominent regional organizations. This Note then addresses three pressing questions regarding the international law of regional organizations: (1) how can a regional organization's primary role in peacekeeping be reconciled with its member states' Charter obligations? (2) do regional organizations have a right to humanitarian intervention in their regions? and (3) are regional organizations under a responsibility to protect?*

INTRODUCTION

On December 18, 2009, a United Nations Commission of Inquiry found that the killings, torture, rape, imprisonment, and persecution of civilians by the Guinean government in response to the Conakry protests of September 28, 2009 rose to the level

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of a crime against humanity.<sup>1</sup> Five days prior to the release of the Commission's report, Dr. Mohammed Ibn Chambas, President of the Economic Community of West African States (ECOWAS), called for a special ECOWAS force to protect civilians in Guinea.<sup>2</sup> The efforts of Burkina Faso President Blaise Compaore, the ECOWAS-appointed mediator assisting ECOWAS' International Contact Group on Guinea,<sup>3</sup> have since resulted in the Ouagadougou Agreement creating a framework and transition governmental authority to restore stability to the country.<sup>4</sup> The unrest in Guinea posed a threat not only to the civilians in that nation who were subject to internationally criminal acts, but also to the neighboring states of Guinea, and in particular, the member states of ECOWAS.<sup>5</sup> ECOWAS, a recognized African regional organization, acted on its own accord as the entity to provide a first-instance response to the crisis.

Civil unrest within sovereign states and dire threats to targeted ethnic populations have plagued the African continent since decolonization. The laudable response of the African states, particularly in the recent decades, has been a series of interventions and peacekeeping operations through their regional organizations now formalized by treaty. At least in part, these actions fall under Chapter VIII of the United Nations Charter (UN Charter, Charter) dedicated to regional organizations.<sup>6</sup> UN Charter Article 53 empowers regional organizations to engage in peacekeeping and enforcement, but by its text, places these operations under the Security Council's authority.<sup>7</sup> The trend in the recent decade, however, has been towards regional organizations taking action before the Council takes seizin to address a conflict situation. But beyond simply ad hoc or coincidental practice, the regional organizations increasingly view themselves as the bodies charged and empowered with primary responsibility to maintain peace, security, and stability in their regions.

There are notable advantages to a regional organization taking a greater role in assisting the Security Council with its mandate to maintain international peace and security. There are even advantages to the regional organization serving as the first entity to respond to conflict situations within its region, factors including cultural knowledge, a greater vested interest, and freedom from the political and logistical constraints endemic to the Council. But the first-instance peacekeeping role assumed by regional organizations is at least facially inconsistent with the framework for the maintenance of international peace and security envisioned by the UN Charter. Moreover, the

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<sup>1</sup> International Commission of Inquiry, *Report of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea*, ¶¶ 180, 198–200, 216, U.N. Doc. S/2009/693 Annex (Dec. 18, 2009) [hereinafter Guinea Report].

<sup>2</sup> Institute for Security Studies, *Guinea's Future Remains Uncertain After Attempt to Kill Camara Failed*, Dec. 17, 2009, available at <http://www.issafrica.org/pgcontent.php?UID=8695>.

<sup>3</sup> Press Release, Economic Community of West African States, International Contact Group Calls for New Transitional Authority in Guinea (Oct. 13, 2009), available at <http://news.ecowas.int/presseshow.php?nb=108&lang=en&annee=2009>.

<sup>4</sup> Communiqué of the African Union (Jan. 16, 2010), available at [http://www.africa-union.org/root/ua/Actualites/2010/jan/Communique%20Guinea%20\\_Eng.pdf](http://www.africa-union.org/root/ua/Actualites/2010/jan/Communique%20Guinea%20_Eng.pdf).

<sup>5</sup> *Guinea—International Forces Needed, Says ECOWAS Leader*, PERISCOPE DAILY DEFENSE NEWS CAPSULES, Dec. 15, 2009.

<sup>6</sup> U.N. Charter arts. 52–54. These provisions of the Charter refer specifically to “regional arrangements or agencies,” which this Note will collectively refer to as regional organizations for convenience.

<sup>7</sup> U.N. Charter art. 53, para. 1.

interventions undertaken by the regional organizations and their revamped treaty frameworks throw new light on the debate over humanitarian intervention and its post-script, the responsibility to protect.

This Note seeks to address the challenge of reconciling this trend among regional organizations with the Charter, as well as the trend's outgrowths in the debate on the law of the use of force. Part I sets forth the main aspects of the Charter framework for regional organizations: their defining characteristics, contemplated enforcement actions, and relationship with the Security Council. Part II reviews the recent practice of Africa's prominent regional organizations that espouse peacekeeping objectives and examines the coordination between the regional organizations and the Security Council. In reviewing the practice of the African regional organizations, this Part places particular emphasis on peacekeeping that comes in the wake of the organizations establishing treaty-based rights to humanitarian intervention, a development that was contemporaneous with the African states' denunciation of the North Atlantic Treaty Organization intervention in Kosovo.<sup>8</sup> Part III then analyzes three resulting questions: (1) how can a regional organization's primary role in peacekeeping be reconciled with its member states' Charter obligations? (2) do regional organizations have a right to humanitarian intervention in their regions? and (3) are regional organizations under a responsibility to protect?

## I. PART I: REGIONAL ORGANIZATIONS IN THE UNITED NATIONS CHARTER FRAMEWORK

### A. Overview

Regional organizations were part of the United Nations (UN) system from its founding,<sup>9</sup> but their more recent practice has significantly redefined their place in the UN framework. During the Dumbarton Oaks and San Francisco Conferences, the Latin American States advocated regionalism and opposed the primacy of the Security Council in peacekeeping, as they feared that a veto by a permanent member could render them defenseless to an armed attack against one of their number.<sup>10</sup> But this related most to collective defense rather than collective security,<sup>11</sup> and was directly addressed in the Charter by Article 51's affirmation of "the inherent right of . . . collective self-defense."<sup>12</sup> As an outgrowth of the Latin American concerns, however, Articles 52 through 54

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<sup>8</sup> See *infra* notes 285–90 and accompanying text for detailed discussion.

<sup>9</sup> LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 354–55 (3d & rev. ed. 1969); Waldemar Hummer & Michael Schweitzer, *Article 52*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 807, ¶¶ 9–11, at 814–15 (Bruno Simma ed., 2d ed. 2002); Anthony Clark Arend, *Symposium: The United Nations, Regional Organizations, and Military Operations: Introduction: The United Nations, Regional Organization, and Military Operations: The Past and Present*, 7 DUKE J. COMP. & INT'L L. 3, 5–7, 12–13 (1996).

<sup>10</sup> Arend, *supra* note 9, at 9–10.

<sup>11</sup> See Capt. Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 235 (1997) (Brown distinguishes collective defense, as relating to a group of states joining together against a common external threat, from collective security as the same group collectively intervening in a member country to "maintain peace and security within or near the group's area of competence.").

<sup>12</sup> Arend, *supra* note 9, at 12–13, 15–16.

(Chapter VIII)<sup>13</sup> provide an explicit role for regional organizations, and specifically, their primacy over pacific dispute settlement.<sup>14</sup> While regional organizations have undertaken classic Chapter VI-type<sup>15</sup> pacific dispute settlement,<sup>16</sup> the more recent trend has been for regional organizations to take a first-instance role in actions involving the use of force.<sup>17</sup> This is beyond the original contemplation of the UN, and must thus be reconciled with the relevant provisions of the UN Charter.

As a preliminary matter, there exists a tension between use of force by regional organizations and the Charter's cornerstone principle of the non-use of force, embodied in Article 2(4).<sup>18</sup> The prohibition in Article 2(4) was meant to be essentially all-encompassing, with the inclusion of "territorial integrity or political independence"<sup>19</sup> drafted to "cover any possible kind of transfrontier use of armed force."<sup>20</sup> The Charter recognizes only three exceptions by which the use of force can be legal.<sup>21</sup> Specifically, any nation or group of nations may use force in individual or collective self-defense in response to an armed attack,<sup>22</sup> the Security Council may use force in exercise of its

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<sup>13</sup> U.N. Charter arts. 52–54.

<sup>14</sup> Arend, *supra* note 9, at 16–17; Alan K. Henrikson, *Symposium: The United Nations, Regional Organizations, and Military Operations: The United Nations and Regional Organizations: "King-Links" of a "Global Chain"*, 7 DUKE J. COMP. & INT'L L. 35, 38, 43 (1996); GOODRICH, HAMBRO & SIMONS, *supra* note 9, at 355–56; *see also* U.N. Charter art. 52, para. 2 ("The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council."), art. 33, para. 1 ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, . . . resort to regional agencies or arrangements . . .").

<sup>15</sup> By "classic" Chapter VI actions, this Note refers to the sorts of pacific dispute settlement practices enumerated in U.N. Charter art. 33, para. 1, namely, "negotiation, enquiry, mediation, conciliation, arbitration, . . . or other peaceful means," that involve no use of force. *See* Christian Tomuschat, *Article 33*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 583, ¶ 2, at 584, ¶¶ 26–34, at 588–91 (Bruno Simma ed., 2d ed. 2002); Hummer & Schweitzer, *supra* note 9, ¶ 53, at 825.

<sup>16</sup> *See* Henrikson, *supra* note 14, at 48 (briefly mentioning the Organization of African Unity's resolution of the 1972 Moroccan-Algerian border dispute).

<sup>17</sup> Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND. J. TRANSNAT'L L. 643, 644–45 (2007); James E. Hickey, Jr., *Challenges to Security Council Monopoly Power Over the Use of Force in Enforcement Actions: The Case of Regional Organizations*, 10 IUS GENTIUM 77, 79 (2004); Alexander Orakhelashvili, *The Legal Basis of the United Nations Peace-Keeping Operations*, 43 VA. J. INT'L L. 485, 514 (2003); *see also* Thomas Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AJIL 88, 100 (2006) (discussing a "regionalization" of humanitarian rescue in the face of the veto and "rescue fatigue" stymieing the Security Council from acting).

<sup>18</sup> U.N. Charter art. 2, para. 4; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 148 (Dec. 19), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>.

<sup>19</sup> U.N. Charter art. 2, para. 4.

<sup>20</sup> Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, ¶ 36, at 123 (Bruno Simma ed., 2d ed. 2002); *see also* Jonathan I. Charney, *Editorial Comments: NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 AJIL 834, 835–36 (1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EJIL 1, 2 (1999).

<sup>21</sup> Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons From East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOR. AFF. 31, 36–37 (2002); Christine Chinkin, *The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) Under International Law*, 49 INT'L & COMP. L.Q. 910, 910 (2000); *see also* Randelzhofer, *supra* note 20, ¶ 15, at 117.

<sup>22</sup> U.N. Charter art. 51; Voon, *supra* note 21, at 37.

Chapter VII powers,<sup>23</sup> and the Council may authorize the use of force by a regional organization under Chapter VIII.<sup>24</sup>

This trifecta of exceptions to Article 2(4)'s prohibition of the use of force—self-defense under Article 51, Security Council enforcement under Chapter VII, and regional enforcement in accordance with Chapter VIII—forms the framework within which this Note will analyze the primacy role played by the African regional organizations in peacekeeping.<sup>25</sup> It is difficult to deny that a truly primary peacekeeping role of a regional organization, rather than the Security Council, is *prima facie* in derogation of the UN Charter, as UN Member States “confer on the Security Council primary responsibility for the maintenance of international peace and security.”<sup>26</sup> It is also difficult to deny that the use of force against a UN Member State without contemporaneous consent or Council authorization is *prima facie* in violation of Article 2(4).<sup>27</sup> But the African regional organizations have already taken this step,<sup>28</sup> and it is inappropriate to say that the United Nations should obstruct the African states from policing their continent in a manner consistent with their customs and needs.<sup>29</sup> This Note will thus first present the Charter's framework for regional peacekeeping operations and later evaluate three legal interpretations to reconcile the practice of the African regional organizations with the African states' Charter obligations.<sup>30</sup>

*B. Chapter VIII of the United Nations Charter: The Framework for Regional Organizations*

1. Article 52: What constitutes a valid regional organization?

By the text of Article 52(1), the Charter's requirement of regional organizations is only that “such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.”<sup>31</sup> Commentators have indicated that this references Chapter I of the Charter, “Purposes and Principles of the United Nations.”<sup>32</sup> The Purposes presented in Article 1 include the maintenance of international peace and

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<sup>23</sup> U.N. Charter arts. 39, 41, 42; Voon, *supra* note 21, at 37.

<sup>24</sup> U.N. Charter art 53, para. 1 (“But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . . .”); Voon, *supra* note 21, at 37; Arend, *supra* note 9, at 23.

<sup>25</sup> Treatment of collective self-defense is outside the scope of this Note and will not be discussed.

<sup>26</sup> U.N. Charter art. 24; *see also id.* 103 (granting primacy to UN Charter obligations over inconsistent obligations arising from other international agreements); Rudolf Bernhardt, *Article 103, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1292, ¶ 14, at 1297 (Bruno Simma ed., 2d ed. 2002).

<sup>27</sup> David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 623 (1995); Charney, *supra* note 20, at 835–36.

<sup>28</sup> *See* W. Michael Reisman, *Prevention: Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT'L L. 57, 74–75 (2008).

<sup>29</sup> Jeremy Levitt, *Symposium: The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift: The Peace and Security Council of the African Union: The Known Unknowns*, 13 TRANSNAT'L L. & COMTEMP. PROBS. 109, 125–28 (2003) [hereinafter Levitt AUPSC].

<sup>30</sup> *See infra* notes 245–63 and accompanying text.

<sup>31</sup> U.N. Charter art. 52, para. 1.

<sup>32</sup> Hummer & Schweitzer, *supra* note 9, ¶ 54, at 825.

security,<sup>33</sup> “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,”<sup>34</sup> economic, social, cultural, and humanitarian cooperation,<sup>35</sup> and “respect for human rights and for fundamental freedoms without distinctions as to race, sex, language, or religion.”<sup>36</sup> Article 2 includes the Principles of sovereign equality,<sup>37</sup> good faith,<sup>38</sup> pacific settlement of disputes,<sup>39</sup> prohibition of the use of force,<sup>40</sup> the maintenance of peace and security,<sup>41</sup> and the authority of the Council to intervene in Member States’ domestic jurisdiction in accordance with Chapter VII.<sup>42</sup>

The requirement of Article 52(1) is broad in its formulation,<sup>43</sup> but the *travaux préparatoires* of the Charter indicate that the main type of international organization contemplated by Chapter VIII was that designed to assist with the maintenance of international peace and security.<sup>44</sup> These would be organizations that were equipped and empowered to address local disputes and thereby assist the UN in its mandate.<sup>45</sup> The member states should share some commonalities, including geographic, cultural, linguistic, community of interest, or historical factors,<sup>46</sup> but this is not an exhaustive list.<sup>47</sup> The organization may or may not have a constitutive treaty instrument.<sup>48</sup> Additionally, collective self-defense organizations were less within Chapter VIII’s contemplation compared with organizations that would engage in intra-regional policing and dispute settlement.<sup>49</sup>

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<sup>33</sup> U.N. Charter art. 1, para. 1.

<sup>34</sup> *Id.* art. 1, para. 2.

<sup>35</sup> *Id.* art. 1, para. 3.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* art. 2, para. 1.

<sup>38</sup> *Id.* art. 2, para. 2.

<sup>39</sup> *Id.* art. 2, para. 3.

<sup>40</sup> *Id.* art. 2, para. 4.

<sup>41</sup> *Id.* art. 2, para. 6.

<sup>42</sup> *Id.* art. 2, para. 7.

<sup>43</sup> Hummer & Schweitzer, *supra* note 9, ¶ 30, at 820.

<sup>44</sup> *Id.* ¶ 30, at 820, ¶¶ 42–45, at 823–24; GOODRICH, HAMBRO & SIMONS, *supra* note 9, at 356; *see also* Land and Maritime Boundary Between Cameroon and Nigeria, Preliminary Objections (Cameroon v. Nig.), 1998 I.C.J. 275, ¶ 67, at 306–07.

<sup>45</sup> Hummer & Schweitzer, *supra* note 9, ¶ 37, at 822.

<sup>46</sup> *Id.* ¶ 32, at 820–21, ¶ 66, at 828 (listing, e.g., the Organization of African Unity as a universally-acknowledged Chapter VIII body); GOODRICH, HAMBRO & SIMONS, *supra* note 9, at 356.

<sup>47</sup> *See* GOODRICH, HAMBRO & SIMONS, *supra* note 9, at 356; Hummer & Schweitzer, *supra* note 9, ¶ 88, at 835 (acknowledging the Organization for Security and Cooperation in Europe (OSCE) as a Chapter VIII body).

<sup>48</sup> Hickey, *supra* note 17, at 89; *see also* Hummer & Schweitzer, *supra* note 9, ¶ 88, at 835 (evaluating OSCE as a valid Chapter VIII body despite its lack of a constitutive treaty).

<sup>49</sup> Hummer & Schweitzer, *supra* note 9, ¶ 42, at 823, ¶¶ 51–52, at 825.

## 2. Article 53(1): What constitutes a regional enforcement action?

There are at least two important factors that bear on the question of what constitutes an “enforcement action . . . under regional arrangements or by regional agencies”:<sup>50</sup> the use of military force, and the target state. Under the original construction, “enforcement action” was to be equated with the Chapter VII powers conferred upon the Security Council, i.e., economic sanctions, severance of diplomatic or trade relations, or other measures short of the use of force,<sup>51</sup> as well as measures involving the use of military force.<sup>52</sup> Because scholarly opinion typically concludes that economic sanctions or severance of diplomatic relations do not constitute enforcement actions,<sup>53</sup> this Note will concentrate on regional organizations’ use of military force. The weight of scholarly opinion is that regional organization activity involving the use of force, including peacekeeping measures,<sup>54</sup> would be in violation of Article 2(4) absent Security Council authorization, and that “enforcement action” includes all such uses of force by regional organizations.<sup>55</sup>

A separate view, however, is that peacekeeping operations by regional organizations in accordance with a constitutive treaty framework against one of the organization’s members do not constitute “enforcement actions” within the meaning of Article 53.<sup>56</sup> Some have even gone as far as saying that regional peace operations within the organization’s membership fall under Article 52 of the UN Charter.<sup>57</sup> Under this view, peace operations against third states that are not members of the regional organization require Security Council authorization, while uses of force within the organization’s membership are exempt from Article 53’s requirement of Council authorization.<sup>58</sup>

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<sup>50</sup> U.N. Charter art. 53, para. 1.

<sup>51</sup> U.N. Charter art. 41.

<sup>52</sup> U.N. Charter art. 42; GOODRICH, HAMBRO & SIMONS, *supra* note 9, at 365; Georg Ress & Jürgen Bröhmer, *Article 53*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 854, ¶ 4, at 860 (Bruno Simma ed., 2d ed. 2002); Ugo Villani, *The Security Council’s Authorization of Enforcement Action by Regional Organizations*, 6 MAX PLANCK UNYB 535, 536 (2002).

<sup>53</sup> *E.g.*, Ress & Bröhmer, *supra* note 52, ¶ 4, at 860; *but see* ADEMOLA ABASS, REGIONAL ORGANISATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: BEYOND CHAPTER VIII OF THE UN CHARTER 46–52 (2004) (reviewing scholarly opinion and submitting that non-military sanctions may also constitute enforcement actions).

<sup>54</sup> Ress & Bröhmer, *supra* note 52, ¶ 5, at 861.

<sup>55</sup> Franck, *supra* note 17, at 100 (“Article 53 of the Charter . . . requires prior approval by the Security Council before a regional organization initiates the use of force.”); Ress & Bröhmer, *supra* note 52, ¶ 7, at 861; Villani, *supra* note 52, at 539–40; ABASS, *supra* note 53, at 43 (Abass reviews scholarly opinion here, but later takes the stance that peacekeeping falls under Article 52(2)).

<sup>56</sup> ABASS, *supra* note 53, at 157; SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 342 (1996).

<sup>57</sup> Maj. J.D. Godwin, *NATO’s Role in Peace Operations: Reexamining the Treaty After Bosnia and Kosovo*, 160 MIL. L. REV. 1, 32–37, 48 (1999); Orakhelashvili, *supra* note 17, at 514; Binaifer Nowrojee, *Joining Forces: United Nations and Regional Peacekeeping—Lessons from Liberia*, 8 HARV. HUM. RTS. J. 129, 131–32 (1995); *see also* ABASS, *supra* note 53, at 45.

<sup>58</sup> MURPHY, *supra* note 56, at 342–43.

3. Article 53(1): What is the nature of the required Security Council authorization?

The terms of Article 53(1) indicate that in order for a regional organization to legally engage in an enforcement action, it must receive authorization from the Council before undertaking the enforcement.<sup>59</sup> However, sufficient scholarly opinion indicates that approval or commendation of a regional enforcement action after it has taken place satisfies the authorization requirement of Article 53(1), often pointing to the Security Council's treatment of the 1990 intervention in Liberia by ECOWAS.<sup>60</sup> As a brief illustration of this form of Security Council authorization, ECOWAS intervened in Liberia in August 1990 without prior authorization from the Security Council.<sup>61</sup> By way of Resolution 788, the Council, "[r]ecalling the provisions of Chapter VIII of the Charter of the United Nations,"<sup>62</sup> "[c]ommend[ed] ECOWAS for its efforts to restore peace, security and stability to the conflict in Liberia."<sup>63</sup> Scholars have interpreted this to constitute the required Security Council authorization for a regional enforcement action.<sup>64</sup> As discussed below, the Council has applied this approach towards the African regional organizations with appreciable consistency.

C. *Relationship Between Chapter VIII and Chapter VII*

A final point worth brief discussion is whether the Council has established a distinct Chapter VIII competence or whether all Council enforcement falls under its Chapter VII powers. Some scholars assert that authorization under Chapter VII requires a finding that the situation poses a threat to peace, with this requirement absent from the Council's use of regional organizations pursuant to Chapter VIII,<sup>65</sup> while others find the requirements to be identical under both Chapters.<sup>66</sup> An additional distinction is that a Chapter VII action is under the auspices of the Council, while a Chapter VIII operation is under the auspices of the relevant regional organization.<sup>67</sup> In its practice, the Council has typically acted under both Chapters simultaneously when it utilizes regional

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<sup>59</sup> U.N. Charter art. 53, para. 1; Eugene Rostow, *The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense?*, 85 AJIL 506, 515 (1991); Franck, *supra* note 17, at 100; Ress & Bröhmer, *supra* note 52, ¶ 15, at 864.

<sup>60</sup> Simma, *supra* note 20, at 4; Hakimi, *supra* note 17, at 670; Villani, *supra* note 52, at 543; Ruth Wedgwood, *Agora: Future Implications of the Iraq Conflict: The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AJIL 576, 578 (2003); Ress & Bröhmer, *supra* note 52, ¶¶ 16–17, at 865, ¶¶ 22, 24, 25, at 866; ABASS, *supra* note 53, at 53–54; *see also* Jeffrey S. Morton, *The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law*, 9 ILSA J. INT'L & COMP. L. 75, 94–95 (2002).

<sup>61</sup> Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L. J. 333, 346 (1998) [hereinafter Levitt ECOWAS]; Letter Dated 9 August 1990 From the Permanent Representative of Nigeria to the United Nations Addressed to the Secretary-General, U.N. Doc. S/21485 (Aug. 9, 1990); *see also* ABASS, *supra* note 53, at 45 n.131.

<sup>62</sup> S.C. Res. 788, pmb., U.N. Doc. S/RES/788 (Nov. 19, 1992).

<sup>63</sup> *Id.* ¶ 1.

<sup>64</sup> *E.g.*, Villani, *supra* note 52, at 543; Wedgwood, *supra* note 60, at 578; Hickey, *supra* note 17, at 112.

<sup>65</sup> Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46, 84 & n.209 (1992).

<sup>66</sup> Hickey, *supra* note 17, at 85–86.

<sup>67</sup> *See id.*

organizations to address threats to international peace and security.<sup>68</sup> The resolutions that have been regarded as ex-post authorizations under Article 53(1) at times explicitly mention of Chapter VIII and at times do not.<sup>69</sup>

This Note will next review in detail the interaction between Africa's prominent regional organizations and the UN Security Council to set the stage for an evaluation of these organizations' primacy over regional peacekeeping. Both the African Union (AU) and ECOWAS have undertaken classic peacekeeping involving the use of force within the sovereign jurisdictions of one of their member states, at times without prior Security Council authorization and at times in coordination with the Council. This practice reveals a growing trend that the regional organizations deem it their right and prerogative to maintain stability in their regions, and will do so with or without Council involvement. As an evolutionary step in international peacekeeping, the practice must be reconciled with the UN framework and related aspects of *jus ad bellum*.

## II. PART II: PEACEKEEPING ACTIVITY OF THE AFRICAN REGIONAL ORGANIZATIONS

### A. *The African Union*

#### 1. Constitutive framework

Covering all 53 countries on the African continent,<sup>70</sup> the African Union is the successor to the Organization of African Unity (OAU), a universally-recognized Chapter VIII body with the purpose of maintaining regional peace and security.<sup>71</sup> The AU's Constitutive Act (AU Constitutive Act) includes the promotion of "peace, security, and stability on the continent"<sup>72</sup> as one of its objectives, and as principles, "the right of the [AU] 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"<sup>73</sup> and "the right of Member States to request intervention from the [AU] in order to restore

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<sup>68</sup> In relation to the situation in Bosnia and Herzegovina, see S.C. Res. 787, ¶ 12, U.N. Doc. S/RES/787 (Nov. 16, 1992); S.C. Res. 820, pmbl., ¶ 9, pmbl. to Part B, ¶¶ 12–30, U.N. Doc. S/RES/820 (Apr. 17, 1993); see also Brown, *supra* note 11, at 261. In relation to the Sierra Leone situation, see S.C. Res. 1132, pmbl., ¶ 8, U.N. Doc. S/RES/1132 (Oct. 8, 1997); see also Levitt ECOWAS, *supra* note 61, at 366.

<sup>69</sup> Compare S.C. Res. 787, *supra* note 68, pmbl., ¶ 1, with S.C. Res. 1162, ¶ 2, U.N. Doc. S/RES/1162 (Apr. 17, 1998); see also Villani, *supra* note 52, at 543–44, 555–56.

<sup>70</sup> List of Countries which have Signed, Ratified/Acceded to the Constitutive Act of the African Union, available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Constitutive%20Act%20of%20the%20African%20Union.pdf>.

<sup>71</sup> Corinne A. A. Packer & Donald Rukare, *The New African Union and its Constitutive Act*, 96 AJIL 365, 370–72 (2002); Hummer & Schweitzer, *supra* note 9, ¶¶ 68–69, at 829–30; Berhanykun Andemicael, *The Organization of African Unity and the United Nations: Relation in the Peace and Security Field*, in REGIONALISM AND THE UNITED NATIONS 225, 225–26 (Berhanykun Andemicael ed., 1979).

<sup>72</sup> Constitutive Act of the African Union art. 3, para. f, July 11, 2000, OAU Doc. No. CAB/LEG/23.15 (entered into force May 26, 2001), available at [http://www.africa-union.org/About AU/Constitutive Act.htm](http://www.africa-union.org/About%20AU/Constitutive%20Act.htm) [hereinafter AU Constitutive Act].

<sup>73</sup> *Id.* art. 4, para. h.

peace and security.”<sup>74</sup> The African Union’s Peace and Security Council (AUPSC) was established as an organ of the AU<sup>75</sup> through the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (AUPSC Protocol),<sup>76</sup> an instrument that is in force with 44 ratifications at the time of this writing.<sup>77</sup> The AUPSC includes among its objectives the promotion of peace, security, and stability in Africa,<sup>78</sup> and among its guiding principles, “the right of the [AU] to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the [AU] Constitutive Act”<sup>79</sup> and “the right of [AU] Member States to request intervention from the [AU] in order to restore peace and security, in accordance with Article 4(j) of the [AU] Constitutive Act.”<sup>80</sup> Furthermore, the AUPSC Protocol establishes the African Standby Force specifically “to enable the Peace and Security Council to [sic] perform its responsibilities with respect to the deployment of peace support missions and interventions pursuant to article 4(h) and (j) of the [AU] Constitutive Act.”<sup>81</sup>

Equally as significant as the specific empowerments of the AU, its Peace and Security Council, and the African Standby Force is the primacy role the AU has given itself in the maintenance of peace, security, and stability in the African continent through Article 16 of the AUPSC Protocol.<sup>82</sup> While the AUPSC Protocol states that the AUPSC “shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security,”<sup>83</sup> and will seek United Nations support for AU activity “in keeping with the provisions of Chapter VIII of the UN Charter,”<sup>84</sup> the Protocol’s statement of the AU’s primary responsibility over peace, security and stability in Africa appears to run counter to the primacy conferred upon the UN Security Council.<sup>85</sup> The provision could mean that the AU takes primacy over sub-regional organizations like ECOWAS and the South African Development Community (SADC), but scholarly opinion and practice reveal

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<sup>74</sup> *Id.* art. 4, para. j; *see also* Levitt AUPSC, *supra* note 29, at 111–12; Nsongurua Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. W. INT’L L.J. 69, 75–76 (2002); Packer & Rukare, *supra* note 71, at 372–73; ABASS, *supra* note 53, at 165.

<sup>75</sup> AU Constitutive Act, *supra* note 72, art. 5, para. 2.

<sup>76</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 7, 2002, *available at* [http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol\\_peace%20and%20security.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol_peace%20and%20security.pdf) [hereinafter AUPSC Protocol].

<sup>77</sup> List of Countries which have Signed, Ratified/Acceded to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/List/Peace%20and%20Security%20Protocol.pdf>.

<sup>78</sup> AUPSC Protocol, *supra* note 76, art. 3, para. a.

<sup>79</sup> *Id.* art. 4, para. j.

<sup>80</sup> *Id.* art. 4, para. k.

<sup>81</sup> *Id.* art. 13, para. 1; *see also* Levitt AUPSC, *supra* note 29, at 121–22.

<sup>82</sup> AUPSC Protocol, *supra* note 76, art. 16, para. 1; *see also* Levitt AUPSC, *supra* note 29, at 125; ABASS, *supra* note 53, at 165–66.

<sup>83</sup> AUPSC Protocol, *supra* note 76, art. 17, para. 1.

<sup>84</sup> *Id.* art. 17, para. 2; *see also* Levitt AUPSC, *supra* note 29, at 125–26.

<sup>85</sup> *See supra* notes 26–27 and accompanying text.

differently.<sup>86</sup> For instance, discussions between Prof. Ademola Abass and the Director of the Peace and Security Department Sam Ibok reveal that the provision was intended to give the AU a primacy role over the Security Council, and that Council authorization would not necessarily be sought prior to deploying the African Standby Force. As Mr. Ibok states:

We [AU] are not an arm of the United Nations. We accept the UN's global authority but we will not wait for the UN to authorize [sic] an action we intend to take. . . . We [AU] are in a tacit agreement with the United Nations on this and there is an understanding to that effect.<sup>87</sup>

In the immediate wake of the above statement from February 2, 2004,<sup>88</sup> the AU was the first entity to take action in Darfur.

## 2. Darfur

The crisis in Darfur stems from a complex set of conflicts in the Sudan principally drawing from armed clashes between Sudanese government-supported Janjaweed militia, the Sudanese Liberation Army (SLA), and the Justice Equality Movement (JEM), inflicting harm upon the civilians of the Fur, Zaghawa, and Massalit tribes.<sup>89</sup> The parties adopted a ceasefire on April 8, 2004,<sup>90</sup> by which time hundreds had been killed<sup>91</sup> and hundreds of thousands had been displaced either within the Sudan or into neighboring Chad.<sup>92</sup> The African Union was first to respond, initially with an unarmed observer group,<sup>93</sup> followed by the “partial deployment of AU Military Observers” pursuant to the Ceasefire Commission established on June 9, 2004.<sup>94</sup> At its Third Ordinary Session in early July 2004, the Assembly of the African Union increased the size of the observer group and “decide[d] that the protection force should be deployed immediately.”<sup>95</sup> Later that month, the AUPSC recognized the “urgent need” to implement this decision,<sup>96</sup> “[took] note of the progress made in the deployment of the military observers and steps taken towards the deployment of the Protection Force,”<sup>97</sup> and

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<sup>86</sup> Levitt AUPSC, *supra* note 29, at 125–26; *cf.* Laurence Juma, *Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives*, 13 MICH. ST. J. INT'L L. 417, 487 (2005).

<sup>87</sup> ABASS, *supra* note 53, at 166; *see also* Levitt AUPSC, *supra* note 29, at 127–28.

<sup>88</sup> ABASS, *supra* note 53, at 166.

<sup>89</sup> Nadia A. Deans, Comment, *Tragedy of Humanity: The Issue of Intervention in the Darfur Crisis*, 19 EMORY INT'L L. REV. 1653, 1661–66 (2005).

<sup>90</sup> Press Release 51/2004, African Union, The Sudanese Parties Sign the Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in the Darfur (May 28, 2004).

<sup>91</sup> Human Rights Watch, Sudan: Darfur in Flames: Atrocities in Western Sudan 17–18 (Apr. 2004), *available at* <http://www.hrw.org/reports/2004/sudan0404/sudan0404.pdf>.

<sup>92</sup> *Id.* at 34–35; *see also* Deans, *supra* note 99, at 1665–66.

<sup>93</sup> Leilani F. Battiste, *The Case for Intervention in the Humanitarian Crisis in the Sudan*, 11 ANN. SURV. INT'L & COMP. L. 49, 58 (2005).

<sup>94</sup> Communiqué of the Twelfth Meeting of the Peace and Security Council, ¶ A.8, PSC/MIN/Comm.(XII) (July 4, 2004); *see also* Matthew Solis et al., *International Legal Updates*, 15 HUM. RTS. BR. 30, 33 (2007).

<sup>95</sup> Decision on Darfur, ¶ 7, Assembly/AU/Dec.54(III) (July 6–8, 2004).

<sup>96</sup> Communiqué of the Thirteenth Meeting of the Peace and Security Council, ¶ 2, PSC/PR/Comm.(XIII) (July 27, 2004) [hereinafter AUPSC Comm(XIII)].

opened the door to transforming the AU Mission on the ground into a peacekeeping mission.<sup>98</sup>

The Security Council had issued an initial resolution in mid-June 2004, indicating “its readiness to consider establishing a United Nations peace support operation to support the implementation of a Comprehensive Peace Agreement”<sup>99</sup> and “welcom[ing] African Union efforts” to bring about a political agreement to solidify the April ceasefire agreement.<sup>100</sup> This peace support operation developed into the United Nations Advance Mission in Sudan (UNAMIS), a group under the Secretary-General.<sup>101</sup> The first enforcement action by the Council, however, came after the AU had begun its peacekeeping on the ground. In Resolution 1556, the Council exercised its Chapter VII powers<sup>102</sup> to adopt an arms embargo on “all non-governmental entities and individuals, including the Janjaweed . . . .”<sup>103</sup> In relation to the AU, the Council “express[ed] its full support for the African Union-led ceasefire commission and monitoring mission in Darfur”<sup>104</sup> and “welcome[d] the communiqué of the African Union Peace and Security Council issued 27 July 2004.”<sup>105</sup>

The African Union Mission in Sudan (AMIS) was formally created several months later through the AUPSC’s Communiqué of the Seventeenth Meeting.<sup>106</sup> With an initial size of 2,341 military personnel and 3,320 personnel in total,<sup>107</sup> AMIS was charged with monitoring the ceasefire agreement in place, protecting civilians, and returning internally displaced persons to their homes.<sup>108</sup> The mission received immediate support from the Security Council.<sup>109</sup> In March 2005, the Council rolled UNAMIS into the UN Mission in Sudan (UNMIS), a Chapter VII operation of up to 10,000 troops<sup>110</sup> with a mandate similar to AMIS<sup>111</sup> and requested to “closely and continuously liaise and coordinate at all levels with [AMIS].”<sup>112</sup> UNMIS continued as a parallel Chapter VII peacekeeping operation,<sup>113</sup> and through Resolution 1769, the Council began the transition

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<sup>97</sup> *Id.* ¶ 8.

<sup>98</sup> *Id.* ¶ 9.

<sup>99</sup> S.C. Res. 1547, ¶ 3, U.N. Doc. S/RES/1547 (June 11, 2004).

<sup>100</sup> *Id.* ¶ 6.

<sup>101</sup> *See* S.C. Res. 1574, ¶ 7, U.N. Doc. S/RES/1574 (Nov. 19, 2004).

<sup>102</sup> S.C. Res. 1556, pmb., U.N. Doc. S/RES/1556 (July 30, 2004).

<sup>103</sup> *Id.* ¶¶ 7–8; *see also* Battiste, *supra* note 93, at 58.

<sup>104</sup> *Id.* ¶ 16.

<sup>105</sup> *Id.* pmb.

<sup>106</sup> Communiqué of the Seventeenth Meeting of the Peace and Security Council, ¶ 4, PSC/PR/Comm.(XVII) (Oct. 20, 2004).

<sup>107</sup> *Id.* ¶ 7.

<sup>108</sup> *Id.* ¶ 6.

<sup>109</sup> S.C. Res. 1574, *supra* note 111, ¶ 13.

<sup>110</sup> S.C. Res. 1590, ¶ 1, U.N. Doc. S/RES/1590 (Mar. 24, 2005).

<sup>111</sup> *Id.* ¶¶ 4, 16

<sup>112</sup> *Id.* ¶ 2.

<sup>113</sup> *See, e.g.*, S.C. Res. 1627, ¶ 1, U.N. Doc. S/RES/1627 (Sept. 23, 2005); S.C. Res. 1714, ¶ 1, U.N. Doc. S/RES/1714 (Oct. 6, 2006).

of AMIS into “an AU/UN Hybrid operation in Darfur (UNAMID),”<sup>114</sup> also a Chapter VII operation.<sup>115</sup> At the time of this writing, UNAMID includes roughly 14,000 troops.<sup>116</sup>

The African Union lived up to its promise to be the first to respond to the crisis in Darfur. In reconciling the above practice with the requirements of the UN Charter, one may view the initial Security Council resolution, Resolution 1547, as authorizing a role for the AU<sup>117</sup> or Resolution 1556’s support for the AU ceasefire commission and monitoring mission<sup>118</sup> as ex-ante approval of the AUPSC’s articulated plan to undertake a peacekeeping operation.<sup>119</sup> In line with this view, only the AUPSC’s plan had been adopted and AMIS troops were deployed after Resolution 1556. One may find that Resolution 1556’s invocation of the Council’s Chapter VII authority<sup>120</sup> indicated a threat to international peace and security, allowing for AUPSC involvement without express delegation. It is also possible to construe the initial deployment of troops before Resolution 1556 as a military observers<sup>121</sup> and not an enforcement action, thus falling under the AU’s primary authority under Article 52 of the Charter. Alternatively, one may view the expressed support by the Council in the wake of each step taken by the AUPSC<sup>122</sup> to constitute ex-post authorization under UN Charter Article 53(1). From any of these standpoints, this Note submits that the continued AU/UN coordination indicates support by the international community of the AU’s first-instance action to address the Darfur crisis.

### 3. Burundi

The conflict in Burundi is in many ways a spillover from the Rwandan genocide of 1994.<sup>123</sup> In 1996, Burundi’s neighboring states, under the leadership of former Tanzanian President Julius Nyerere, offered both pacific dispute settlement measures and offers for peacekeeping assistance to the Burundian government to control the exacerbated ethnic tension between the Hutus and Tutsis.<sup>124</sup> In response to the military

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<sup>114</sup> S.C. Res. 1769, ¶ 1, U.N. Doc. S/RES/1769 (July 31, 2007).

<sup>115</sup> *Id.* ¶ 15.

<sup>116</sup> The Secretary-General, *Report of the Secretary-General on the African Union-United Nations Hybrid Operation in Darfur (UNAMID)*, ¶ 37, delivered to the Security Council, U.N. Doc. S/2009/592 (Nov. 16, 2009).

<sup>117</sup> See S.C. Res. 1547, *supra* note 99, ¶ 6.

<sup>118</sup> See S.C. Res. 1556, *supra* note 112, ¶ 16.

<sup>119</sup> See AUPSC Comm(XIII), *supra* note 96, ¶ 9.

<sup>120</sup> See, e.g., S.C. Res. 1556, *supra* note 112; S.C. Res. 1564, pmbi., U.N. Doc. S/RES/1564 (Sept. 18, 2004).

<sup>121</sup> See Dana Michael Hollywood, *It Takes a Village . . . Or At Least a Region: Rethinking Peace Operations in the Twenty-First Century, the Hope and Promise of African Regional Institutions*, 19 FLA. J. INT’L L. 75, 145–146 (2007).

<sup>122</sup> See, e.g., S.C. Res. 1556, *supra* note 112, ¶ 16; S.C. Res. 1574, *supra* note 111, ¶ 13.

<sup>123</sup> Patricia Reyhan, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?*, 60 ALB. L. REV. 771, 773 (1997).

<sup>124</sup> *Id.* at 772–73.

coup by then-Major Pierre Buyoya that year, these nations imposed a trade embargo against Burundi.<sup>125</sup>

The events received little attention from the Security Council aside from its declaring readiness to impose an arms embargo,<sup>126</sup> supporting consultations with the OAU,<sup>127</sup> and condemning the coup.<sup>128</sup> It was not until April 2003 that a peacekeeping operation was instituted to address the situation. In its first peacekeeping deployment, the AU commenced the African Mission in Burundi (AMIB) with a mandate to monitor the ceasefire, ensure safe passage, and provide humanitarian assistance.<sup>129</sup> When taken over by the AUPSC in March 2004, it was explicitly mentioned that AMIB was to be transitioned to a UN-mandated peacekeeping force,<sup>130</sup> a vision that materialized two months later when the Security Council deployed the United Nations Operation in Burundi (ONUB) as a Chapter VII action.<sup>131</sup>

As per its first-instance role established in the AUPSC Protocol, the AU was first to respond in Burundi. Coordination with the UN was contemplated from the start. However, the Security Council provided no ex-ante authorization and welcomed AMIB only after the fact.<sup>132</sup> In the view of this Note, this implies that either AMIB was not an enforcement action or that the Council's ex-post authorization, here explicit,<sup>133</sup> satisfied Article 53(1)'s requirement.

#### 4. Somalia

The Security Council placed Somalia on its agenda 1992 when it exercised its Chapter VII power in Resolution 733, imposing a complete arms embargo on the country.<sup>134</sup> "Recalling also the provisions of Chapter VIII of the Charter,"<sup>135</sup> the Council "call[ed] upon all States and international organizations to contribute to the efforts of

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<sup>125</sup> *Id.*

<sup>126</sup> S.C. Res. 1040, ¶ 8, U.N. Doc. S/RES/1040 (Jan. 29, 1996).

<sup>127</sup> S.C. Res. 1049, ¶ 13, U.N. Doc. S/RES/1049 (Mar. 5, 1996).

<sup>128</sup> S.C. Res. 1072, ¶ 1, U.N. Doc. S/RES/1072 (Aug. 30, 1996); *see also* Reyhan, *supra* note 123, at 774.

<sup>129</sup> Communiqué of the Ninety-First Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level, ¶ 5, Central Organ/MEC/AMB/Comm.(XCI) (Apr. 2, 2003); *see also* Hollywood, *supra* note 121, at 144.

<sup>130</sup> Communiqué of the Peace and Security Council, ¶ 1, PSC/PR/Communiqué (II) (Mar. 25, 2004); *see also* S.C. Res. 1545, pmb., U.N. Doc. S/RES/1545 (May 21, 2004).

<sup>131</sup> S.C. Res. 1545, *supra* note 140, pmb., ¶ 2; *see also* Hollywood, *supra* note 121, at 144.

<sup>132</sup> S.C. Res. 1545, *supra* note 140, pmb. The most recent Security Council resolution prior to Resolution 1545 was in 2001, which expressed support for the Arusha Peace and Reconciliation Agreement of August 2000. The Resolution made no mention of Chapter VII or authorization to regional organizations. *See* S.C. Res. 1375, U.N. Doc. S/RES/1375 (Oct. 29, 2001).

<sup>133</sup> *See supra* note 125 and accompanying text.

<sup>134</sup> S.C. Res. 733, ¶ 5, (Jan. 23, 1992); *see also* Ved P. Nanda, Thomas F. Muther, Jr. & Amy E. Eckert, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law—Part II*, 26 DENV. J. INT'L L. & POL'Y 827, 832 (1998) [hereinafter Nanda Part II].

<sup>135</sup> S.C. Res. 733, *supra* note 144, pmb.

humanitarian assistance to the population in Somalia.”<sup>136</sup> Resolution 794 established the Unified Task Force (UNITAF), a Chapter VII action which authorized Member States to use “all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia,”<sup>137</sup> and “under Chapters VII and VIII of the Charter,”<sup>138</sup> authorized regional organizations to enforce the arms embargo.<sup>139</sup> To transform UNITAF into a UN-led peacekeeping operation,<sup>140</sup> the Council established UNOSOM II as a Chapter VII action.<sup>141</sup> While UNOSOM II was terminated as of March 1995,<sup>142</sup> the arms embargo from 1992 continues to the time of this writing.<sup>143</sup>

The African regional organizations had explicit ex-ante authorization to enforce the arms embargo of Resolution 733, but as for the basis of the AU’s most recent peacekeeping operation, the AU Mission in Somalia (AMISOM),<sup>144</sup> the most explicit authorization from the Security Council came roughly one month before AMISOM’s establishment.<sup>145</sup> Resolution 1725, a Chapter VII resolution,<sup>146</sup> affirmed that its provisions supported peace and stability in Somalia “based on the decisions of [the Intergovernmental Authority on Development] and the Peace and Security Council of the African Union,”<sup>147</sup> and authorized Member States of the African Union “to establish a protection and training mission in Somalia.”<sup>148</sup> Communiqué LXIX of the AUPSC recalled Resolution 1752 “regarding the deployment of a peace support mission in Somalia” when the AUPSC established AMISOM.<sup>149</sup>

The nine-infantry-battalion peacekeeping deployment,<sup>150</sup> with logistical support based on the AMIB model,<sup>151</sup> was established with a mandate to monitor the security situation in its areas and protect Transitional Federal Institutions in their efforts to restore

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<sup>136</sup> *Id.* ¶ 9.

<sup>137</sup> S.C. Res. 794, ¶ 10, U.N. Doc. S/RES/794 (Dec. 3, 1992); *see also* Nanda Part II, *supra* note 144, at 834–35.

<sup>138</sup> S.C. Res. 794, *supra* note 147, ¶ 16.

<sup>139</sup> *Id.*

<sup>140</sup> S.C. Res. 814, pmbl., U.N. Doc. S/RES/814 (Mar. 26, 1993); Nanda Part II, *supra* note 144, at 835.

<sup>141</sup> S.C. Res. 814, *supra* note 140, pmbl. to Part B, ¶¶ 5–6; Nanda Part II, *supra* note 144, at 835–36.

<sup>142</sup> S.C. Res. 954, ¶ 1, U.N. Doc. S/RES/954 (Nov. 4, 1994); *see also* Nanda Part II, *supra* note 144, at 836.

<sup>143</sup> *See, e.g.*, S.C. Res. 1863, pmbl., U.N. Doc. S/RES/1863 (Jan. 16, 2009); S.C. Res. 1853, pmbl., U.N. Doc. S/RES/1853 (Dec. 19, 2008).

<sup>144</sup> Communiqué of the Sixty-Ninth Meeting of the Peace and Security Council, ¶ 8, PSC/PR/Comm(LXIX) (Jan. 19, 2007) [hereinafter PSC/PR/Comm(LXIX)]; *see also* Yeshimebet M. A. Abebe et al., *Africa*, 42 INT’L LAW. 863, 865–66 (2008) (providing a brief discussion of AMISOM’s initial stages).

<sup>145</sup> S.C. Res. 1725, ¶¶ 1, 3, U.N. Doc. S/RES/1725 (Dec. 6, 2006); *see also* PSC/PR/Comm(LXIX), *supra* note 144, ¶ 3.

<sup>146</sup> S.C. Res. 1725, *supra* note 145, pmbl.

<sup>147</sup> *Id.* ¶ 1.

<sup>148</sup> *Id.* ¶ 3.

<sup>149</sup> PSC/PR/Comm(LXIX), *supra* note 144, ¶ 3.

<sup>150</sup> *Id.* ¶ 9.

<sup>151</sup> *Id.*

governance, peace, and reconciliation in Somalia.<sup>152</sup> In light of AMISOM, the Security Council terminated the Chapter VII action as provided by Resolution 1725.<sup>153</sup> Instead, the Council welcomed AMISOM<sup>154</sup> and, acting under Chapter VII,<sup>155</sup> authorized a mission in Somalia “authorized to take all necessary measures as appropriate” to carry out the peacekeeping mandate outlined in Resolution 1744.<sup>156</sup> Under its Chapter VII powers, the Security Council thus began addressing the situation in Somalia through AMISOM,<sup>157</sup> a coordination that continues to the time of this writing.<sup>158</sup>

On the one hand, it can be contended that Resolution 1725 provided explicit, ex-ante authorization for AMISOM. On the other hand, Resolution 1744 terminated the Chapter VII measures from Resolution 1725 and explicitly recognized AMISOM only after the fact. As regards primacy, AMISOM is the first peacekeeping operation in Somalia since UNOSOM II, which this Note submits as lending support to the first-instance role the AU continues to develop for itself.

### B. *The Economic Community of West African States*

Like the AU, ECOWAS has the goal of maintaining regional peace and security in its region.<sup>159</sup> The evolution of its treaty structure, described below,<sup>160</sup> demonstrates its response to a series of threats to regional peace and security, a response mechanism that has been widely lauded by the international community.<sup>161</sup> In illustrating this pattern of regional peacekeeping response, this Note will only briefly recount the ECOWAS interventions in Liberia and Sierra Leone in light of extensive existing scholarship on these two cases.<sup>162</sup> After presenting a discussion of ECOWAS activity in Guinea-Bissau

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<sup>152</sup> *Id.* ¶ 8, ¶¶ 5–7.

<sup>153</sup> S.C. Res. 1744, ¶ 12, U.N. Doc. S/RES/1744 (Feb. 21, 2007).

<sup>154</sup> *Id.* pmbl.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* ¶ 4.

<sup>157</sup> *Id.*; see also S.C. Res. 1772, U.N. Doc. S/RES/1772 (Aug. 20, 2007); Abebe et al., *supra* note 144, at 865–66.

<sup>158</sup> See, e.g., S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1907, U.N. Doc. S/RES/1907 (Dec. 23, 2009).

<sup>159</sup> Treaty of ECOWAS art. 58, Jul. 24, 1993, 35 I.L.M. 660 [hereinafter ECOWAS 1993 Treaty], available at <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en>; Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security art. 3, Dec. 10, 1999, ECOWAS Doc. A/P10/12/99, available at <http://www.sec.ecowas.int/sitecedea0/english/ap101299.htm> [hereinafter ECOWAS Protocol].

<sup>160</sup> See also generally Jeremy I. Levitt, *Pro-Democracy Intervention in Africa*, 24 WIS. INT’L L.J. 785 (2006) [hereinafter Levitt PDI]; Daniel Doktor, *Minding the Gap: International Law and Regional Enforcement in Sierra Leone*, 20 FLA. J. INT’L L. 329 (2008).

<sup>161</sup> See, e.g., Wedgwood, *supra* note 60, at 578; Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FIN. Y.B. INT’L L. 141, 165 (1999).

<sup>162</sup> See, e.g., Levitt PDI, *supra* note 170, at 796–804; Nanda Part II, *supra* note 144, at 851–62; Levitt ECOWAS, *supra* note 61; Nowrojee, *supra* note 57, at 133–37; Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT’L L. REV. 321 (1998); Ademola Abass, *Africa at the Crossroads: Current Themes in African Law: VI. Conflict Resolution in Africa: The Implementation of ECOWAS’ New Protocol and Security Council Resolution 1270: New Developments in Regional Intervention*, 10 U. MIAMI INT’L & COMP. L. REV. 177 (2002); Eleanor Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil*

and Côte d'Ivoire, this Note will discuss the recent ECOWAS action in light of the deaths in Conakry, Guinea, on Sept. 28, 2009.<sup>163</sup>

## 1. Evolution of the treaty framework

By its original construction in 1975, ECOWAS was an organization dedicated to the economic development of its member states.<sup>164</sup> Its aims were exclusively economic, and even its 1981 Protocol Relating to Mutual Assistance of Defense<sup>165</sup> was a collective self-defense agreement rather than one focused on intra-regional peacekeeping.<sup>166</sup> Nevertheless, the urgency of the Liberian coup and civil strife led to ECOWAS establishing its ECOWAS Ceasefire Monitoring Group (ECOMOG) to restore stability to Liberia.<sup>167</sup> It was after the successful Liberia intervention that ECOWAS revised its constitutive instrument in 1993 to the present-day Treaty of ECOWAS (1993 Treaty).<sup>168</sup> Article 58 of this newly-constructed treaty created the framework for ECOWAS member states' collaboration towards "the maintenance of peace, stability, and security within the region"<sup>169</sup> and the establishment of "a regional peace and security observation system and peace-keeping forces."<sup>170</sup>

In the wake of its interventions in Sierra Leone and Guinea-Bissau, and to implement Article 58 of its 1993 Treaty, ECOWAS adopted its Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (ECOWAS Peacekeeping Protocol).<sup>171</sup> Article 22 of this instrument explicitly charged ECOMOG with the role of peacekeeping, but also bestowed upon it the mission of humanitarian intervention.<sup>172</sup> Article 41 calls for cooperation with both the AU and UN, but while Article 52 of the ECOWAS Peacekeeping Protocol states that "ECOWAS shall inform the United Nations of any military intervention undertaken in pursuit of the objectives of [the ECOWAS Peacekeeping Protocol]"<sup>173</sup> in accordance with Chapters VII and VIII of the Charter,<sup>174</sup> nowhere does it state that ECOWAS-ECOMOG will seek Security Council authorization before undertaking peacekeeping or humanitarian intervention. Discussions between Prof. Abass and Roger Laloupo, Director of the

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Wars, 35 NYU J. INT'L L. & POL. 795, 816–19, 824–27 (2003); Laurence Juma, *The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation*, 30 DENV. J. INT'L L. & POL'Y 325 (2002).

<sup>163</sup> See Press Release, ECOWAS, ECOWAS Condemns Acts of Repression in Guinea (Sept. 29, 2009), available at <http://news.ecowas.int/presseshow.php?nb=096&lang=en&annee=2009>.

<sup>164</sup> Treaty of the Economic Community of West African States art. 2, May 28, 1975, 1010 U.N.T.S. 17, 14 I.L.M. 1200; Levitt PDI, *supra* note 170, at 795; Doktori, *supra* note 170, at 331–32.

<sup>165</sup> Protocol Relating to Mutual Assistance on Defence pmbl., art. 3, May 29, 1981, 1690 U.N.T.S. 51.

<sup>166</sup> Levitt PDI, *supra* note 170, at 795; Doktori, *supra* note 170, at 332.

<sup>167</sup> Levitt PDI, *supra* note 170, at 796–97.

<sup>168</sup> ECOWAS 1993 Treaty, *supra* note 159; Levitt PDI, *supra* note 170, at 798–99.

<sup>169</sup> ECOWAS 1993 Treaty, *supra* note 159, art. 58, para. 1.

<sup>170</sup> *Id.* art. 58, para. 2(f); Levitt PDI, *supra* note 170, at 799.

<sup>171</sup> ECOWAS Protocol, *supra* note 159, art. 3; Levitt PDI, *supra* note 170, at 807–08.

<sup>172</sup> ECOWAS Protocol, *supra* note 159, art. 22; Levitt PDI, *supra* note 170, at 808.

<sup>173</sup> ECOWAS Protocol, *supra* note 159, art. 52.

<sup>174</sup> *Id.*

ECOWAS Legal Department in 2000, reflect ECOWAS' intention that it will not hesitate to engage in peacekeeping in the absence of ex-ante authorization from the Security Council.<sup>175</sup>

## 2. Liberia

In 1989, Charles Taylor and the National Patriotic Front of Liberia seized much of the country and advanced on Monrovia, the capital, leading President Samuel Doe to call on ECOWAS for assistance.<sup>176</sup> In August 1990, ECOWAS established ECOMOG to intervene in Liberia.<sup>177</sup> ECOWAS did not obtain permission from the Security Council for this military deployment,<sup>178</sup> and the action had no basis in ECOWAS' constitutive instruments.<sup>179</sup>

The Security Council's response came through Resolution 788, over a year after the ECOMOG intervention.<sup>180</sup> "Recalling the provisions of Chapter VIII,"<sup>181</sup> the Resolution "commend[ed] ECOWAS for its efforts to restore peace, security and stability in Liberia,"<sup>182</sup> and under Chapter VII, imposed an arms embargo on Liberia.<sup>183</sup> In light of the ceasefire agreement signed in the summer of 1993,<sup>184</sup> the Council established the UN Observer Mission in Liberia (UNOMIL) through Resolution 866,<sup>185</sup> hailing it as "the first peace-keeping mission undertaken by the United Nations in cooperation with a peace-keeping mission already set up by another organization, in this case ECOWAS."<sup>186</sup> The practice of the Security Council, particularly through Resolution 788, is viewed by many commentators as ex-post authorization of the ECOMOG intervention.<sup>187</sup> This Note submits that this explanation is convincing in light of the explicit recognition of the ECOWAS peacekeeping mission in the preamble to Resolution 866.

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<sup>175</sup> ABASS, *supra* note 53, at 166–67.

<sup>176</sup> Levitt PDI, *supra* note 170, at 796.

<sup>177</sup> *Id.* at 796–97.

<sup>178</sup> David Wippman, *Symposium: The United Nations, Regional Organizations, and Military Operations: Article: Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 225 (1996); Hakimi, *supra* note 17, at 670.

<sup>179</sup> Brown, *supra* note 11, at 257.

<sup>180</sup> S.C. Res. 788, U.N. Doc. S/RES/788 (Nov. 19, 1992); Villani, *supra* note 52, at 543.

<sup>181</sup> S.C. Res. 788, *supra* note 62, pmb1.

<sup>182</sup> *Id.* ¶ 1; *see also* Levitt PDI, *supra* note 170, at 797.

<sup>183</sup> S.C. Res. 788, *supra* note 62, ¶ 8; Nanda Part II, *supra* note 144, at 232.

<sup>184</sup> Letter Dated 6 August 1993 from the Charge d'Affaires A.I. of the Permanent Mission of Benin to the United Nations Addressed to the Secretary-General, Annex, U.N. Doc. S/26272 (Aug. 9, 1993) (Cotonou Agreement); Nanda Part II, *supra* note 144, at 861; *see also* Wippman, *supra* note 27, at 607–08 & 608 n.4.

<sup>185</sup> S.C. Res. 866, ¶ 2, U.N. Doc. S/RES/866 (Sept. 22, 1993); Nanda Part II, *supra* note 144, at 861.

<sup>186</sup> S.C. Res. 866, *supra* note 185, pmb1.; *see also* Abass, *supra* note 172, at 178 & n.3.

<sup>187</sup> *E.g.*, Villani, *supra* note 52, at 543–44; Levitt AUPSC, *supra* note 29, at 127 & n.135; ABASS, *supra* note 53, at 54–56; *but see* Hakimi, *supra* note 17, at 670.

### 3. Sierra Leone

A coup in 1997 led by Major Paul Koromah and the Revolutionary United Front forced President Ahmad Tejan Kabbah to flee and request assistance from Nigeria.<sup>188</sup> After an initial Nigerian response, ECOWAS instituted an economic blockade against Sierra Leone in August 1997 to be enforced by ECOMOG.<sup>189</sup> Several months later, the Security Council adopted Resolution 1132,<sup>190</sup> which, under Chapters VII and VIII,<sup>191</sup> formalized the embargo halting the “sale or supply to Sierra Leone . . . of petroleum and petroleum products and arms and related matériel of all types,”<sup>192</sup> an embargo to be enforced by ECOWAS.<sup>193</sup> A military campaign by ECOMOG in early 1998 led to the reinstatement of President Kabbah.<sup>194</sup> On March 16, 1998, the Security Council terminated the embargo on petroleum and petroleum products.<sup>195</sup>

Later in April 1998, the Security Council “welcome[d] the efforts made by the democratically elected President of Sierra Leone since his return on 10 March 1998”<sup>196</sup> and “commend[ed] the Economic Community of West African States (ECOWAS) and its Military Observer Group (ECOMOG) . . . on the important role they [played] in support of the objectives related to the restoration of peace and security”<sup>197</sup> and President Kabbah’s reinstatement.<sup>198</sup> This Note submits that the fact that both Resolutions 1132 and 1162 came after military engagement by ECOWAS supports the view that they constitute ex-post authorization by the Council.<sup>199</sup>

### 4. Guinea-Bissau

A threatened mutiny against President Bernardo Nino Vieira in June 1998 prompted his request for an ECOMOG deployment.<sup>200</sup> After initial conciliation efforts by ECOWAS leading up to December 1998, President Vieira and the leader of the mutiny agreed to an ECOMOG deployment to monitor security along the Guinea-Bissau/Senegal border.<sup>201</sup> Days before the ECOMOG deployment, the Security Council adopted Resolution 1216,<sup>202</sup> commending ECOWAS,<sup>203</sup> “approv[ing] the implementation

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<sup>188</sup> Levitt PDI, *supra* note 170, at 799; Abass, *supra* note 172, at 181.

<sup>189</sup> Levitt PDI, *supra* note 170, at 800.

<sup>190</sup> S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997); *see also* Levitt PDI, *supra* note 170, at 800.

<sup>191</sup> S.C. Res. 1132, *supra* note 200, pmb1., ¶ 8.

<sup>192</sup> *Id.* ¶ 6.

<sup>193</sup> *Id.* ¶ 8; *see also* Levitt PDI, *supra* note 170, at 800.

<sup>194</sup> Levitt PDI, *supra* note 170, at 800; Abass, *supra* note 172, at 181.

<sup>195</sup> S.C. Res. 1156, ¶ 2, U.N. Doc. S/RES/1156 (Mar. 16, 1998).

<sup>196</sup> S.C. Res. 1162, *supra* note 69, ¶ 1.

<sup>197</sup> S.C. Res. 1162, *supra* note 69, ¶ 2.

<sup>198</sup> *Id.*; *see also* Juma, *supra* note 172, at 352.

<sup>199</sup> *Accord* Juma, *supra* note 172, at 352 & n.313; Villani, *supra* note 52, at 555–56; Wedgwood, *supra* note 60, at 578.

<sup>200</sup> Levitt PDI, *supra* note 170, at 805.

<sup>201</sup> *Id.*

<sup>202</sup> S.C. Res. 1216, U.N. Doc. S/RES/1216 (Dec. 21, 1998); Levitt PDI, *supra* note 170, at 806.

by the ECOMOG interposition force of its mandate” to maintain security along the Guinea-Bissau/Senegal border<sup>204</sup> and “affirm[ing] that the ECOMOG interposition force may be required to take action to ensure the security and freedom of movement of its personnel in the discharge of its mandate.”<sup>205</sup> While the Resolution did not make mention of Chapters VII or VIII, this Note observes that it constitutes the first explicit ex-ante authorization of an ECOWAS peacekeeping operation.

## 5. Côte d’Ivoire

A coup that began in September 2002 cost President Laurent Gbagbo control of Côte d’Ivoire.<sup>206</sup> At President Gbagbo’s request, ECOWAS deployed a peacekeeping force the next month, and conciliation efforts by ECOWAS and other international actors resulted in the Linas-Marcoussis Agreement of January 2003.<sup>207</sup> The following month, the situation prompted action by the Security Council. In Resolution 1464, the Council “recall[ed] the decision taken by the [ECOWAS] Summit held in Accra on 29 September 2002 to deploy a peacekeeping force in Côte d’Ivoire”<sup>208</sup> and “welcom[ed] the deployment of ECOWAS forces and French troops with a view to contributing to the peaceful solution of the crisis.”<sup>209</sup> The resolution further authorized “ECOWAS forces in accordance with Chapter VIII together with the French forces supporting them to take the necessary steps to guaranty the security and freedom of movement of their personnel and to ensure . . . the protection of civilians . . . .”<sup>210</sup> Roughly a year later, the Council adopted Resolution 1528 establishing the United Nations Operation in Côte d’Ivoire (UNOCI), a Chapter VII operation<sup>211</sup> that would assume the ECOWAS forces and monitor the ceasefire.<sup>212</sup> At the time of this writing, UNOCI remains an active UN peacekeeping operation.<sup>213</sup> In this case as well, Council authorization for the ECOWAS peacekeeping operation through Resolution 1464 came after the fact,<sup>214</sup> which this Note submits as lending further support to the interpretation that ex-post authorization satisfies the requirement of UN Charter Article 53(1).

## 6. Guinea

At the time of this writing, the situation in Guinea is perhaps a half year old. On September 28, 2009, protesters rallied against Capt. Moussa David Camara who had

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<sup>203</sup> S.C. Res. 1216, *supra* note 212, ¶ 3; Levitt PDI, *supra* note 170, at 806.

<sup>204</sup> S.C. Res. 1216, *supra* note 212, ¶ 4; Levitt PDI, *supra* note 170, at 806.

<sup>205</sup> S.C. Res. 1216, *supra* note 212, ¶ 6; Levitt PDI, *supra* note 170, at 806.

<sup>206</sup> Levitt PDI, *supra* note 170, at 808–09.

<sup>207</sup> *Id.* at 809–10.

<sup>208</sup> S.C. Res. 1464, pmb., U.N. Doc. S/RES/1464 (Feb. 4, 2003).

<sup>209</sup> *Id.* ¶ 8; *see also* James Sloan, *The Use of Offensive Force in U.N. Peacekeeping: A Cycle of Boom or Bust?*, 30 HASTINGS INT’L & COMP. L. REV. 385, 441 n.312 (2007).

<sup>210</sup> S.C. Res. 1464, *supra* note 218, ¶ 9.

<sup>211</sup> S.C. Res. 1528, pmb., U.N. Doc. S/RES/1528 (Feb. 27, 2004).

<sup>212</sup> *Id.* ¶¶ 1, 6; *see also* Levitt PDI, *supra* note 170, at 810.

<sup>213</sup> S.C. Res. 1880, ¶ 19, U.N. Doc. S/RES/1880 (Jul. 30, 2009).

<sup>214</sup> *See supra* notes 208–09 and accompanying text.

seized control of Guinea through a coup in 2008.<sup>215</sup> At the protest, over 150 were killed when Guinean troops on the scene opened fire.<sup>216</sup> Recognizing the risk of a wide-scale massacre and resulting regional instability, ECOWAS announced that it was contemplating an intervention force.<sup>217</sup> The United Nations later established a Commission of Inquiry to determine the facts of the protest in Conakry and response from Guinean troops.<sup>218</sup> While not putting itself forward as a competent body of international legal adjudication, the report finds that the events in Conakry constitute a crime against humanity.<sup>219</sup> ECOWAS continues to facilitate the peace-building process through its International Contact Group and has deployed a limited security force.<sup>220</sup> To the extent that the situation in Guinea requires further peacekeeping measures of intervention by ECOWAS, it is probable that ECOWAS will continue to be the entity that takes on a first-instance role.

### C. *South African Development Community*

While SADC has empowered itself with pacific dispute settlement capabilities,<sup>221</sup> at least at the time of this writing it has not taken on autonomous peacekeeping powers by treaty. Since this Note submits that a proper Chapter VIII entity must have the maintenance of international peace and security as one of its goals,<sup>222</sup> this Note will only briefly review SADC.<sup>223</sup>

By its constitutive instruments, SADC has the objective to develop peacekeeping capacity,<sup>224</sup> retains some ability to recommend peacekeeping,<sup>225</sup> and has established the SADC Brigade as part of the AU's African Standby Force.<sup>226</sup> At the same time, SADC has also recognized for itself a subordinate role to the UN Security Council.<sup>227</sup> Specifically, SADC's autonomous authority empowers it to "manage and resolve inter-

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<sup>215</sup> 'Dozens Killed' at Guinea Protest, BBC NEWS, Sept. 29, 2009, available at <http://news.bbc.co.uk/2/hi/africa/8279103.stm>.

<sup>216</sup> Guinea Ruler 'Must Face Charges', BBC NEWS, Oct. 14, 2009, available at <http://news.bbc.co.uk/2/hi/africa/8307678.stm>.

<sup>217</sup> ECOWAS Mulls Guinea Intervention Force, BBC NEWS, Dec. 14, 2009, available at <http://news.bbc.co.uk/2/hi/africa/8411456.stm>.

<sup>218</sup> Unearthing the Truth of the Guinea 'Bloodbath', BBC NEWS, Nov. 25, 2009, available at <http://news.bbc.co.uk/2/hi/africa/8376800.stm>.

<sup>219</sup> Guinea Report, *supra* note 1, ¶¶ 180, 198, 216.

<sup>220</sup> See *supra* notes 3–5 and accompanying text.

<sup>221</sup> Treaty of the Southern African Development Community, as Amended, art. 4, para. b, Aug. 2001, [hereinafter SADC Amended Treaty], available at <http://www.sadc.int/index/browse/page/120>; see also Treaty of the Southern African Development Community, art. 4, para. b, Aug. 17, 1992, 32 I.L.M. 116.

<sup>222</sup> See *supra* notes 44–45 and accompanying text.

<sup>223</sup> A discussion of the Mission for the Implementation of the Bangui Agreement (MISAB), an "ad hoc grouping[]" of states that nonetheless had undertaken a peacekeeping operation in the Central African Republic, see Levitt PDI, *supra* note 170, at 787, 792, is also outside the scope of this Note.

<sup>224</sup> Protocol on Politics, Defense and Security Cooperation art. 2, para. 2(k), Aug. 14, 2001, available at <http://www.sadc.int/index/browse/page/157> [hereinafter SADC Protocol].

<sup>225</sup> *Id.* art. 11, para. 3(c).

<sup>226</sup> Abebe et al., *supra* note 144, at 874.

<sup>227</sup> *Id.* art. 11, para. 3(d).

and intra-state conflicts by peaceful means”<sup>228</sup> including “preventive diplomacy, negotiations, conciliation, mediation, good offices, arbitration, and adjudication by an international tribunal.”<sup>229</sup> The Chairperson of the Organ on Politics, Defense and Security (SADC Organ) may recommend enforcement action to the Summit of the Heads of State or Government of All Members,<sup>230</sup> but “[t]he Summit shall resort to enforcement action only as a matter of last resort and, in accordance with Article 53 of the United Nations Charter, only with the authorization of the United Nations Security Council.”<sup>231</sup> Nonetheless, SADC engaged in a brief peacekeeping operation in Lesotho in 1998 through the SADC Organ.<sup>232</sup> As of this writing, there have been no Council resolutions in relation to that action.

#### D. *Synthesis*

Both the AU and ECOWAS have asserted for themselves the primary responsibility over maintaining peace, security, and stability in their regions, an assertion they have borne out in their practice. This is not to say that the Security Council has abdicated its responsibility over the African continent, nor that it has expressly delegated that authority *in toto* to the African regional organizations. Rather, the practice reveals continued coordination, simultaneous engagement, and in many cases, eventual assumption of the regional peacekeeping operation into a UN-mandated operation. It may be difficult to pin down exactly which entity responded first in cases like Darfur or Sierra Leone, and in cases like Somalia and Guinea-Bissau, the argument can be made that the Council provided explicit ex-ante authorization. However, cases like Burundi, Liberia, and Côte d’Ivoire indicate that the regional organization can be the first to respond and later be folded into a UN operation. While the response may be collaborative or simultaneous engagement by the regional organization and the Council, there is practice to support truly first-instance engagement by the regional organization.

### III. PART III: THREE QUESTIONS IN LIGHT OF THE DEVELOPING CUSTOM OF REGIONAL ORGANIZATIONS

In light of the practice reviewed above, this Note will review three questions of legal reconciliation. A regional organization’s primacy peacekeeping role runs counter to UN Member States’ agreement to bestow primary responsibility over the maintenance of international peace and security upon the Security Council.<sup>233</sup> Thus, regional organizations’ primacy role must be reconciled with this obligation under the UN Charter. Because the constitutive treaties of the AU and ECOWAS recognize the right to humanitarian intervention vested in these regional organizations’ peacekeeping mechanisms, it throws new light on the debated international law doctrine of humanitarian intervention. Lastly, because the recent discourse on sovereign states’

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<sup>228</sup> art. 11(1)(c).

<sup>229</sup> *Id.* art. 11(3)(a).

<sup>230</sup> *Id.* art. 11(3)(c); *see also* SADC Amended Treaty, *supra* note 221, art. 10.

<sup>231</sup> *Id.* art. 11(3)(d).

<sup>232</sup> Levitt PDI, *supra* note 170, at 819–24.

<sup>233</sup> U.N. Charter art. 24, para. 1.

responsibility to protect, and the concurrent responsibility of the international community, has been an outgrowth of the humanitarian intervention debate, the role of regional organizations in the framework of the responsibility to protect is worth examining.

A. *How Can A Regional Organization's Primary Role In Peacekeeping Be Reconciled With Its Member States' Charter Obligations?*

Commentators have argued that regional organizations are better suited than the Security Council to handle some conflict situations because of logistical, cultural, and political reasons. Prominent among the normative arguments in favor of the primacy of regional organizations are the structural impediment posed by the veto in the Security Council and the reticence sometimes displayed by the Council.<sup>234</sup> Additionally, logistical and budgetary constraints may impair the Council's ability to address a situation that regional organizations may be better equipped to handle.<sup>235</sup> Regional organizations may be more apt to quell conflicts within their member states because of proximity<sup>236</sup> and superior knowledge of cultural issues that bear on the conflicts.<sup>237</sup> Furthermore, the urgency of a situation may demand action by an entity before the Security Council takes action.<sup>238</sup> In critically evaluating the primacy of regional organizations in peacekeeping, commentators have expressed concerns including issues of accountability in the organizations' use of force<sup>239</sup> and domination of the organization by a single hegemon.<sup>240</sup>

In addition to these normative concerns, however, there remains the legal point that UN Member States have vested primary responsibility over the maintenance of international peace and security in the Security Council.<sup>241</sup> Moreover, Charter obligations prevail over conflicting international obligations,<sup>242</sup> leading scholars to find regional treaty provisions asserting primacy over peacekeeping to be *prima facie* inconsistent with the Charter.<sup>243</sup> This Note submits that for the first-instance peacekeeping role of regional organizations to be legal under the UN system, this role must somehow not pose "a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement."<sup>244</sup>

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<sup>234</sup> Orakhelashvili, *supra* note 17, at 514; Brown, *supra* note 11, at 236–37; *see also* Franck, *supra* note 17, at 100; Levitt PDI, *supra* note 170, at 786; ABASS, *supra* note 53, at 88–100.

<sup>235</sup> Hickey, *supra* note 17, at 121–22.

<sup>236</sup> Voon, *supra* note 21, at 67.

<sup>237</sup> Nowrot & Schabacker, *supra* note 172, at 407–08.

<sup>238</sup> Maj. Ronald M. Riggs, *The Grenada Intervention: A Legal Analysis*, 108 MIL. L. REV. 1, 54 (1985).

<sup>239</sup> *See* Hickey, *supra* note 17, at 133–34.

<sup>240</sup> *See* Hollywood, *supra* note 121, at 141; Doktori, *supra* note 170, at 348–49.

<sup>241</sup> U.N. Charter arts. 24, para. 1.

<sup>242</sup> *Id.* art. 103.

<sup>243</sup> Bernhardt, *supra* note 26, ¶ 14, at 1297; *see also* Levitt AUPSC, *supra* note 29, at 126–27 (discussing the apparent inconsistency but then providing arguments for the legality of the AU's primacy role).

<sup>244</sup> U.N. Charter art. 103.

Some commentators find that first-instance regional enforcement actions do not rise to the level of a use of force prohibited by Article 2(4).<sup>245</sup> Prof. Ssekandi acknowledges the possibility that forcible intervention in response to a coup d'état could be permissible under Article 51.<sup>246</sup> According to this interpretation, the military coup would constitute the armed attack necessary to invoke collective self-defense.<sup>247</sup> Prof. Abass argues that Article 2(4) prohibits both aggression and uses of force short of aggression; the former prohibition is a peremptory norm while Abass argues that the latter is not.<sup>248</sup> Treaty-based consent cannot be construed as allowing for the derogation from a peremptory norm, but to the extent that the derogation is from the prohibition of force short of aggression, treaty-based consent may be sufficient to exempt the use of force from Article 2(4)'s prohibition.<sup>249</sup> As Abass acknowledges,<sup>250</sup> however, some commentators find that blanket consent by treaty is insufficient, and that only contemporaneous consent by the state subject to the use of force exempts the action from Article 2(4)'s prohibition.<sup>251</sup> Moreover, the International Court of Justice has hinted that Article 2(4)'s prohibition of the use of force as a whole, by some accounts, has the status of a *jus cogens* norm.<sup>252</sup>

Among commentators who find that regional enforcement constitutes a breach of Article 2(4), some find that when the action is a peacekeeping mission in a member country, it falls under regional organizations' primacy role as provided in Article 52.<sup>253</sup> Sufficient scholarly opinion, however, is that the measures contemplated by Article 52 are strictly limited to the pacific dispute settlement activities enumerated in Article 33(1).<sup>254</sup> While commentators have sometimes cited to the International Court of Justice's *Certain Expenses* Advisory Opinion,<sup>255</sup> that Opinion involved contemporaneous

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<sup>245</sup> ABASS, *supra* note 53, at 208; Peter E. Harrell, Note, *Modern-Day 'Guarantee Clauses' and the Legal Authority of Multinational Organizations To Authorize the Use of Military Force*, 33 YALE J. INT'L L. 417, 429 (2008)

<sup>246</sup> E-mail from Francis Ssekandi, Adjunct Professor, Columbia Law School, Panel Member, International Center for the Settlement of Investment Disputes, to Suyash Paliwal (Jan. 30, 2010, 15:57:00 EST) (on file with author) [hereinafter Ssekandi Email].

<sup>247</sup> *Id.* See also U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of . . . collective self-defence if an armed attack occurs against a Member of the United Nations . . ."); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 193–94, at 102–03 (June 27) [hereinafter *Nicaragua (Merits)*].

<sup>248</sup> ABASS, *supra* note 53, at 191–99.

<sup>249</sup> *Id.* at 201–02, 208; see also Harrell, *supra* note HarrellNote, at 429–30.

<sup>250</sup> ABASS, *supra* note 53, at 203.

<sup>251</sup> Wippman, *supra* note 27, at 623 ("there is nothing inherently wrong with a treaty authorizing such intervention, provided that the treaty specifies that intervention may only be undertaken with the contemporaneous consent of the affected state."); W. Michael Reisman, *Termination of the USSR's Treaty Right to Intervene in Iran*, 74 AJIL 144, 152 (1980) (stating that a use of force "necessarily infringes the territorial integrity of the target, and insofar as it is not invited by that state *in that particular instance*, it impairs its political independence.") (emphasis added).

<sup>252</sup> *Nicaragua (Merits)*, 1986 I.C.J. 14, ¶¶ 190, at 100–01.

<sup>253</sup> See *supra* note 58 and accompanying text.

<sup>254</sup> See Hummer & Schweitzer, *supra* note 9, ¶ 53, at 825; Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention*, 93 AJIL 824, 827 (1999).

<sup>255</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, 1962 I.C.J. 151 (Jul. 20); see, e.g., Orakhelashvili, *supra* note 17, at 522 (citing *Certain Expenses*).

consent of the state subject to the peacekeeping action.<sup>256</sup> Thus, this Note submits that regional actions involving the use of force without the contemporaneous consent of the recipient state may best be viewed as “enforcement actions” falling under Article 53.<sup>257</sup>

Finally, some commentators that find regional enforcement actions in breach of Article 2(4), and also falling under Article 53, find that ex-post approval satisfies Article 53(1)’s requirement of Security Council authorization.<sup>258</sup> While some scholars expressly reject this interpretation,<sup>259</sup> others point to the relationship between the Council and ECOWAS as having established this as an acceptable interpretation.<sup>260</sup> In a related manner, Hakimi suggests that an informal, “operational system” has evolved as a functional framework that, while in tension with the Charter, exists in parallel and forms the paradigm in which regional organizations execute their first-instance peacekeeping role.<sup>261</sup> Levitt argues that the ex-post justification that the Council has provided to AU peacekeeping operations falls under Chapter VII of the Charter rather than Article 53(1),<sup>262</sup> and in examining regional organizations outside of Africa, Hickey proposes that the meaning of Chapter VIII should be changed to presume that regional organizations may take enforcement action without authorization unless authorization is expressly denied by the Council.<sup>263</sup>

As an evaluation, this Note submits that the use of force by a regional organization remains a *prima facie* violation of Article 2(4) and must find justification in the Charter. Unless the unrest triggering the regional peacekeeping or intervention rises to the level of an armed attack, collective self-defense through Article 51 remains unavailable. Without having received a delegation of authority by the Council under its Chapter VII powers, the first-instance action by a regional organization to address a threat to regional peace and security must have its basis in Chapter VIII. It is difficult to construe regional peacekeeping as falling under Article 52, and this Note sides with the interpretation that it constitutes enforcement under Article 53. Finally, this Note agrees that ex-post approval by the Council satisfies the authorization requirement for a regional enforcement action under Article 53(1).

At least in a technical sense, however, this only means that the regional enforcement action *was* legal and is legal from the point of the ex-post authorization forward. For a regional organization faced with a pressing threat to regional peace and security, this alone does not mean that prospectively, the regional organization can undertake enforcement with the confidence that it is and will be legal.<sup>264</sup> ECOWAS, for

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<sup>256</sup> *Certain Expenses*, 1962 I.C.J. at 166; *see also* Ress & Bröhmer, *supra* note 52, ¶ 5, at 861.

<sup>257</sup> *See* Ress & Bröhmer, *supra* note 52, ¶ 7, at 861.

<sup>258</sup> *See supra* notes 60–64 and accompanying text.

<sup>259</sup> *See, e.g.*, Nowrot & Schabacker, *supra* note 172, at 363–64; Rostow, *supra* note 59, at 515.

<sup>260</sup> *See, e.g.*, Wedgwood, *supra* note 60, at 578; Villani, *supra* note 52, at 544; *see also* Simma, *supra* note 20, at 4.

<sup>261</sup> Hakimi, *supra* note 17, at 677–85.

<sup>262</sup> Levitt AUPSC, *supra* note 29, at 127–28.

<sup>263</sup> *Cf.* Hickey, *supra* note 17, at 118, 136–37 (proposing a change in Chapter VIII’s meaning to presume that regional organizations may engage in enforcement actions unless authorization is expressly denied by the Security Council).

<sup>264</sup> *See* Henkin, *supra* note 264, at 827.

instance, knows that its interventions in Liberia and Sierra Leone *were* legal in light of the ex-post blessing received from the Security Council, but it does not necessarily know *now* that it can legally intervene in Guinea.

For the prospective legality of first-instance regional peacekeeping, this Note submits that the pattern of activity between the African regional organizations and the Council constitutes international custom under Article 53(1).<sup>265</sup> Based on the practice of the African regional organizations under Chapter VIII, and the response of the Security Council, this Note submits that the African regional organizations by custom have the authorization to engage in enforcement actions as a matter of first-instance unless and until the Council takes seizin. An instance that would undermine this interpretation would be if the AU or ECOWAS had waited for Council authorization before engaging in peacekeeping, indicating a belief that they did not have the Council's approval to engage in peacekeeping. But this is exactly what did not occur.

The practice demonstrating this customary authorization is widespread and consistent as regards the interaction between the Council and both the AU and ECOWAS.<sup>266</sup> In some instances during which the AU or ECOWAS addressed a threat to regional peace, the Council had contemplated or created a role for the regional organization to engage, but in enough cases, the regional organization took seizin on its own accord. Moreover, in each case the regional organization was willing to take seizin with or without Security Council authorization. According to this Note, this constitutes the required *opinio juris* to demonstrate the existence of international custom. The African regional organizations believed they had the right to be the first-instance actor to address threats in their region and engaged in state practice motivated by this sense of legal empowerment. The supporting *opinio juris* is further manifested in the regional organizations' treaties and Council resolutions relating to the peacekeeping operations discussed above. By treaty, the AU and ECOWAS declare that they have primary responsibility for the maintenance of peace and security in their regions, in a manner consistent with Chapter VIII of the UN Charter. The ex-post authorizations by the Council affirm this right, and the two together codify the *opinio juris* that the AU and ECOWAS have this first-instance right. The pattern of practice pursuant to this sense of legal right bestows upon the practice the status of customary international law.

#### *B. Do Regional Organizations Have a Right to Humanitarian Intervention in Their Regions?*

Quite different from viewing the practice of the AU and ECOWAS as international custom falling under Article 53 is finding that the practice solidifies regional humanitarian intervention as a customary exception to Article 2(4) itself.<sup>267</sup> The still

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<sup>265</sup> Statute of the International Court of Justice art. 38, para. 1(b), June 26, 1945, 59 Stat. 1055, 3 Bevens 1179 [hereinafter ICJ Statute]; *Nicaragua (Merits)*, 1986 I.C.J. 14, ¶¶ 183–86, at 97–98 (articulating widespread state practice and corresponding *opinio juris* as the essential elements to ascertain that a practice has the status of customary international law); cf. Reisman, *supra* note 28, at 74–75 (After stating that enforcement action by a regional organization under Chapter VIII would be illegal absent Security Council authorization, Reisman states: “[i]t may be inconsistent with the U.N. Charter but, of course, new customary law is made through violations of existing law to which other states acquiesce.”).

<sup>266</sup> See *supra* Part II.

<sup>267</sup> Ambassador Richard N. Gardner, in recounting the story of advancing an interpretation of Article 53 to justify the U.S. quarantine to address the Cuban Missile Crisis of 1962, acknowledged the tentative nature of that argument. But he states, “if we had to punch a hole in traditional legal restraints on the use of force, the

hotly-debated international law doctrine of humanitarian intervention advances the right of one nation to use force in another nation, the target state, in order to protect the nationals of the target or third state from a human rights catastrophe.<sup>268</sup> Rather than requiring simply a threat to regional or international peace and security, the facts triggering humanitarian intervention must constitute a fundamental human rights violation on a significant scale.<sup>269</sup> These violations triggering the right to use force have sometimes been equated with acts whose prohibition is recognized as a *jus cogens* norm,<sup>270</sup> acts including genocide, war crimes, and crimes against humanity.<sup>271</sup> Jurists and scholars articulating criteria by which the use of force may be justified under the doctrine of humanitarian intervention have typically formulated the following conditions:

- (1) There is a gross violation of human rights on a widespread scale occurring or about to occur in the target state;<sup>272</sup>
- (2) The motive for the use of force is of a humanitarian character, in whole or predominant part;<sup>273</sup>
- (3) The use of military force is necessary;<sup>274</sup>
- (4) The use of military force is proportional to the threat to fundamental human rights;<sup>275</sup>

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hole should be as small as possible.” Richard Gardner, *Agora: The Future Implications of the Iraq Conflict: Neither Bush nor “Jurisprudes”*, 97 AJIL 585, 588 (2003). This Note submits that reconciling the AU/ECOWAS practice with Article 53 probably punches a smaller hole in the Charter than advancing it as an evolved customary exception to Article 2(4) because in this latter formulation, there is no express role for the Security Council.

<sup>268</sup> See, e.g., Greenwood *supra* note 171, at 157–58; Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT’L L. POLY 305, 309 (1991) [hereinafter Nanda Part I].

<sup>269</sup> Nanda Part I, *supra* note 278, at 309; Reyhan, *supra* note 123, at 787; Chinkin, *supra* note 21, at 920; Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 USAFA J. LEG. STUD. 27, 45–46 (2000).

<sup>270</sup> A *jus cogens* norm of international law is typically defined as a peremptory norm so fundamental that derogation is impermissible. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 510–12 (7th ed. 2008)

<sup>271</sup> Chinkin, *supra* note 21, at 920–21; Charney, *supra* note 20, at 838; Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EJIL 23, 27 (1999); see also Voon, *supra* note 21, at 64; Morton, *supra* note 60, at 97; cf. Rome Statute of the International Criminal Court, arts. 6–8, U.N. Doc. A/CONF. 183/9 (17 July 1998) (elaborating on genocide, war crimes, and crimes against humanity).

<sup>272</sup> Greenwood, *supra* note 171, at 171; Nanda Part I, *supra* note 278, at 330; Reyhan, *supra* note 123, at 787; Charney, *supra* note 20, at 838; Cassese, *supra* note 281, at 27; Voon, *supra* note 21, at 64–66; Joyner & Arend, *supra* note 279, at 45–46; Chinkin, *supra* note 21, at 920–21.

<sup>273</sup> Nanda Part I, *supra* note 278, at 330; Reyhan, *supra* note 123, at 788; Cassese, *supra* note 281, at 27; Voon, *supra* note 21, at 78–80; Joyner & Arend, *supra* note 279, at 44–45.

<sup>274</sup> Greenwood, *supra* note 171, at 171; Nanda Part I, *supra* note 278, at 330; Reyhan, *supra* note 123, at 788; Chinkin, *supra* note 21, at 921; see also Cassese, *supra* note 281, at 27.

<sup>275</sup> Greenwood, *supra* note 171, at 171; Nanda Part I, *supra* note 278, at 330; Chinkin, *supra* note 21, at 921; Joyner & Arend, *supra* note 279, at 44; see also Cassese, *supra* note 281, at 27; Voon, *supra* note 21, at 86–87.

(5) Peaceful remedies have been exhausted to the extent appropriate in light of the urgency of the situation;<sup>276</sup>

(6) The UN Security Council is unwilling or unable to respond, possibly because of the threat or use of the veto;<sup>277</sup>

(7) To the extent feasible, the response is a multilateral action, through a collection of states or a regional organization.<sup>278</sup>

A great thrust to the debate on humanitarian intervention took place after the North Atlantic Treaty Organization (NATO) conducted Operation Allied Force in Kosovo,<sup>279</sup> a use of force at least partly justified on humanitarian grounds.<sup>280</sup> In the immediate wake of this event, some commentators expressly denied the existence of a right to humanitarian intervention,<sup>281</sup> while others championed the right as an emerged international custom.<sup>282</sup> Most notable on the side denying an evolved custom is the declaration by the Group of 77 (Group of 77 Declaration, Declaration), which expressly “rejected the so-called right of humanitarian intervention [as having] no basis in the UN Charter or in international law.”<sup>283</sup> The signatories to this Declaration, dated September 24, 1999, included 51 member states of the now-African Union.<sup>284</sup>

This Note asserts that the endorsement of the Group of 77 Declaration by the African states must be viewed in light of two revolutionary and praiseworthy steps in the structures of Africa’s regional organizations that occurred around the same time. Not two months after the Group of 77 Declaration, ECOWAS adopted the ECOWAS Peacekeeping Protocol.<sup>285</sup> Article 22 of this instrument explicitly lists humanitarian intervention as one of the missions of ECOMOG.<sup>286</sup> About two weeks prior to the Group of 77 Declaration, the heads of state of the OAU member states issued the Sirte

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<sup>276</sup> Cassese, *supra* note 281, at 27; Voon, *supra* note 21, at 81–84; Joyner & Arend, *supra* note 279, at 43; *see also* Charney, *supra* note 20, at 838–39.

<sup>277</sup> Greenwood, *supra* note 171, at 171; Joyner & Arend, *supra* note 279, at 44; Chinkin, *supra* note 21, at 921.

<sup>278</sup> Nanda Part I, *supra* note 278, at 330; Reyhan, *supra* note 123, at 788; Cassese, *supra* note 281, at 27; Voon, *supra* note 21, at 66–69; Joyner & Arend, *supra* note 279, at 46.

<sup>279</sup> *See* Voon, *supra* note 21, at 33.

<sup>280</sup> *See, e.g.,* Dino Kritsiotis, *The Kosovo Crisis and NATO’s Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT’L & COMP. L.Q. 330, 340–43 (2000).

<sup>281</sup> *E.g.,* Ian Brownlie, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT’L & COMP. L.Q. 878, ¶123(e), at 904 (2000); Chinkin, *supra* note 21, at 920.

<sup>282</sup> *See* Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT’L & COMP. L.Q. 926, 931 (2000).

<sup>283</sup> Declaration by the Ministers for Foreign Affairs of the Group of 77, ¶ 69 (Sept. 24, 1999), available at <http://www.g77.org/doc/Decl1999.html> [hereinafter Group of 77 Declaration]; *see also* BROWNLIE, *supra* note 280, at 743–44.

<sup>284</sup> BROWNLIE, *supra* note 280, at 744.

<sup>285</sup> ECOWAS Protocol, *supra* note 159. The date of signature is December 10, 1999. The Group of 77 Declaration is dated September 24, 1999. Group of 77 Declaration, *supra* note 293, ¶ 1.

<sup>286</sup> ECOWAS Protocol, *supra* note 159, art. 22.

Declaration calling for a new African Union.<sup>287</sup> Within roughly a year from the Sirte Declaration,<sup>288</sup> the AU was formed with a Constitutive Act that expressly recognizes, in Article 4(h), the right of humanitarian intervention vested in the AU.<sup>289</sup> At first glance, it may seem anomalous that the African states would flatly denounce the right to humanitarian intervention in the Group of 77 Declaration, only to then turn around and expressly recognize this right in their regional treaties. This Note proffers the explanation, however, that while the African states were not amenable to a non-African entity engaging in humanitarian intervention in an African nation, they were willing to themselves police their continent and use force, if needed, to prevent human rights calamities from occurring.<sup>290</sup>

In light of the AU Constitutive Act, AUPSC Protocol, and ECOWAS Peacekeeping Protocol, it is not as clear-cut that humanitarian intervention has no standing in international law. For the reasons discussed above, the regional organization may be in a better position to be a first-instance actor to address or prevent a human rights calamity.<sup>291</sup> This Note submits that it thus becomes worthwhile to consider how the debate on humanitarian intervention changes in light of these steps taken by the African regional organizations, and specifically, if there is justification for a right of regional humanitarian intervention.

#### 1. Regional humanitarian intervention by treaty

Both the AU and ECOWAS have created for themselves a treaty-based right to humanitarian intervention in their regions.<sup>292</sup> As humanitarian intervention, to the extent that it exists, is regarded as a customary exception to Article 2(4),<sup>293</sup> the legality of treaty-based regional humanitarian intervention must be based on either viewing the treaties in their own right as lawful treaty derogations from Charter obligations, or as further support for solidifying regional humanitarian intervention as international custom. This Note maintains that the AUPSC Protocol and ECOWAS Peacekeeping Protocol are facially inconsistent with Article 2(4). The treaties alone are an expression of intent on the part of the contracting parties, but on their own, constitute at most a first step in carving out a legal exception to Article 2(4).

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<sup>287</sup> Sirte Declaration, ¶ 8, EAHG/Draft/Decl. (IV) Rev.1 (Sept. 8–9, 1999), available at [http://www.africa-union.org/Docs\\_AUGovernment/decisions/Sirte\\_Declaration\\_1999.pdf](http://www.africa-union.org/Docs_AUGovernment/decisions/Sirte_Declaration_1999.pdf); see also Packer & Rukare, *supra* note 71, at 370–71.

<sup>288</sup> Packer & Rukare, *supra* note 71, at 371.

<sup>289</sup> See also Thomas Franck, *Agora: Future Implication of the Iraq Conflict: What Happens Now? The United Nations After Iraq*, 97 AJIL 607, 615 (2003).

<sup>290</sup> Ssekandi further explains in response that the African states' criticism of the NATO intervention in Kosovo was based on the opposition to any nation intervening anywhere else "under the guise of humanitarian intervention . . ." That Kosovo was not a member of NATO is significant in comparison to the African regional organizations, in which the members are empowered by but also accountable to one another. Ssekandi Email, *supra* note 246.

<sup>291</sup> See *supra* notes 234–38 and accompanying text.

<sup>292</sup> AU Constitutive Act, *supra* note 72, art. 4, para. h (right of the AU to intervene based on a decision of the Assembly of the AU); AUPSC Protocol, *supra* note 76, art. 6, para. d (outlining intervention as one of the functions of the AUPSC); ECOWAS Protocol, *supra* note 159, art. 22 (right to humanitarian intervention), 26 (right of the Authority, composed of Heads of State and Government of Member States, to initiate humanitarian intervention through the mechanism for collective security and peace).

<sup>293</sup> Chinkin, *supra* note 21, at 910, 917–18.

To the extent that the treaties of their own force do not constitute valid derogations from Article 2(4), they nonetheless form the framework and basis for the AU and ECOWAS to engage in regional humanitarian intervention. Thus, this Note maintains that, when an intervention or pattern of interventions takes place pursuant to the treaty provisions, the practice will have the express *opinio juris* to develop international custom. The treaties, and corresponding resolutions and communiqués, confer the *opinio juris* upon the practice. These treaties constitute a voluntary relinquishment of sovereignty on the part of the member states,<sup>294</sup> giving rise to a right vested in the regional organization and an obligation on the part of the states to accept the intervention. Regional humanitarian interventions undertaken in line with the treaty provisions will thus carry with them the sense of legal obligation motivating the actions. If a right to humanitarian intervention has not yet emerged, it can develop in the direction of regional humanitarian intervention as customary international law through the practice of the African states.

## 2. Regional humanitarian intervention by custom

This Note submits that beyond the impact of treaty-based regional humanitarian intervention in the regional organizations that have adopted these treaties, there is the potential example this sets for other regional organizations that may not yet have adopted constitutive instruments recognizing regional humanitarian intervention. For instance, if SADC were faced with a situation in its region that would, under the common formulations, trigger the purported right to intervene on humanitarian grounds, it is not entirely clear that the lack of a treaty provision alone would bar the legality of a regional humanitarian intervention. A treaty would provide explicit notice of this possibility to all member states, establish greater legitimacy because of the voluntary relinquishment of sovereignty, and provide the guidelines of an institutional framework for conduct and accountability. But ECOWAS lacked an explicit treaty right to humanitarian intervention at the time of Liberia and Sierra Leone, both of which have been advanced as evidence of an emerging international custom.<sup>295</sup> In light of these successful operations, ECOWAS evolved as a Chapter VIII body<sup>296</sup> and now coordinates with the Security Council. This Note submits that a regional organization lacking a treaty-based right to regional humanitarian intervention may nonetheless undertake an intervention and advance the purposes of the UN by evolving and taking on the capability to assist the Security Council.

### C. *Are Regional Organizations Under a Responsibility to Protect?*

Somewhat in reaction to the NATO intervention in Kosovo and the revived debate on humanitarian intervention was the discourse that began on a new principle of international relations, the responsibility to protect (R2P).<sup>297</sup> At the outset, it must be

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<sup>294</sup> Levitt AUPSC, *supra* note 29, at 123; Levitt PDI, *supra* note 170, at 814, 831.

<sup>295</sup> See, e.g., Greenwood, *supra* note 171, at 164–66 (pointing to Liberia as an instance of humanitarian intervention); Sean D. Murphy, *The International Criminal Court and the Crime of Aggression: Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 341, 348 (noting that scholars and states point to both Liberia and Sierra Leone as evidence of an evolved custom of humanitarian intervention).

<sup>296</sup> See generally Levitt PDI, *supra* note 170, at 796–814.

<sup>297</sup> Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 706–07 (2006). The development of the concept of Responsibility to Protect is usually traced through four principal works, see *id.* at 707–15. In chronological order, the documents are INT'L COMM'N ON

stated that R2P and humanitarian intervention are advanced as separate and distinct concepts; at most, one can say that in the evolution of R2P, the notion of an intervener's right was reformulated as a sovereign state's responsibility.<sup>298</sup> The fundamental notion of R2P is that sovereign states bear the primary responsibility to protect their populations from human rights abuses, and in particular, grave violations such as genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>299</sup> When sovereign states fail to fulfill this responsibility through unwillingness or inability, however, the burden falls upon the broader community of states.<sup>300</sup> Thus, the protection of fundamental human rights is no longer the sole responsibility of sovereign states, but rather, is a shared responsibility of the international community and its institutions.<sup>301</sup> As to R2P's status in international law, which at present is debatable, the concept can at best be described as a "normative principle guiding international behavior,"<sup>302</sup> part and parcel with the general principle of sovereignty.<sup>303</sup>

The original formulation of R2P includes a responsibility to prevent deadly conflict through early warning and direct prevention,<sup>304</sup> react to situations in which populations require protection potentially with limited military intervention,<sup>305</sup> and rebuild in the post-conflict setting.<sup>306</sup> By the end of its evolution to its present form, the emphasis of the responsibility to react was to do so through peaceful means, a reaffirmed preparedness to take collective action through the Security Council, and the qualified, case-by-case possibility of coercive action either unilaterally or through regional organizations without prior Council authorization.<sup>307</sup> Regional organizations were given

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INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter ICISS Report], available at <http://www.iciss.ca/report-en.asp> (follow "View Document (PDF)" hyperlink); The Secretary-General, *Report of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004), [hereinafter *Our Shared Responsibility*], available at <http://www.un.org/secureworld/report2.pdf>; The Secretary-General, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All*, delivered to the General Assembly, U.N. Doc. A/59/2005 [hereinafter *In Larger Freedom*], available at <http://www.un.org/largerfreedom/contents.htm> (follow "Report" hyperlink; then follow "Full Report" hyperlink); G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter *World Summit Outcome*].

<sup>298</sup> Evans, *supra* note 297, at 708; *see also* Louise Arbour, *The Responsibility to Protect as Due Care in International Law and Practice*, Press Release, United Nations High Commissioner for Human Rights, High Commissioner Addresses Dublin's Trinity College on Responsibility to Protect, available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/5F1298CB9E6043BEC125739C0058FB02?opendocument>, reprinted in 34 REV. INT'L STUD. 445 (2008).

<sup>299</sup> Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AJIL 99, 99 (2007).

<sup>300</sup> *Id.*; *see also generally* ICISS Report, *supra* note 297.

<sup>301</sup> Stahn, *supra* note 299, at 100–01.

<sup>302</sup> Christopher C. Joyner, "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, 47 VA. J. INT'L L. 693, 708 (2007).

<sup>303</sup> *Id.*; *see also* ICJ Statute, *supra* note 275, art. 38, para. 1(c).

<sup>304</sup> ICISS Report, *supra* note 297, at 19–28.

<sup>305</sup> *Id.* at 29–38.

<sup>306</sup> *Id.* at 39–46; *see also* Joyner, *supra* note 302, at 708–09; Evans, *supra* note 297, at 709; Stahn, *supra* note 299, at 103.

<sup>307</sup> *See* Stahn, *supra* note 299, at 108–09; *cf.* World Summit Outcome, *supra* note 297, ¶ 139.

a role in the R2P discourse from the start and retained their role in the latest formulation.<sup>308</sup>

The developments in the United Nations relating to R2P have gone hand in hand with the initiative for greater coordination between the UN and regional organizations. Days before the World Summit Outcome was adopted by the General Assembly, the Security Council adopted Resolution 1631 calling for increased peacekeeping cooperation between the UN and both regional and subregional organizations.<sup>309</sup> The World Summit Outcome, in paragraph 139, expressed UN Member States' readiness to work through regional organizations, where appropriate, to protect their populations if peaceful means prove insufficient.<sup>310</sup> In the now-famous Resolution 1674 which reaffirmed the provisions of paragraphs 138 and 139 of the World Summit Outcome,<sup>311</sup> the Council explicitly recognized the role played by regional organizations in protecting civilians in armed conflict.<sup>312</sup> Two months later, Secretary-General Kofi Annan presented his report on regional-global security partnerships pursuant to Resolution 1631<sup>313</sup> in which he outlined the need for greater cooperation with regional organization in the areas of conflict prevention,<sup>314</sup> peacekeeping,<sup>315</sup> and protection of civilians,<sup>316</sup> among others. In April 2008, Secretary-General Ban Ki-moon presented a report discussing peacekeeping under Chapter VIII,<sup>317</sup> protection of civilians in armed conflict,<sup>318</sup> humanitarian action,<sup>319</sup> and early warning systems<sup>320</sup> all in the context of cooperation between regional organizations and the UN.

The UN favors a role for regional organizations in the protection of civilians against genocide, war crimes, ethnic cleansing and crimes against humanity, and Member States are amenable to cooperating with regional organizations in taking collective forcible action. R2P is tied to sovereignty<sup>321</sup> and sovereign states bear the primary

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<sup>308</sup> See, e.g., ICISS Report, *supra* note 297, at XIII, 22, 48; Our Shared Responsibility, *supra* note 297, ¶¶ 270–72; In Larger Freedom, *supra* note 297, ¶¶ 213–15; World Summit Outcome, *supra* note 297, ¶ 139.

<sup>309</sup> S.C. Res. 1631, ¶ 1, U.N. Doc. S/RES/1631 (Oct. 17, 2005).

<sup>310</sup> World Summit Outcome, *supra* note 297, ¶ 139.

<sup>311</sup> S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); see also Stahn, *supra* note 299, at 100; Evans, *supra* note 297, at 716 n.44.

<sup>312</sup> S.C. Res. 1674, *supra* note 311, ¶ 24.

<sup>313</sup> The Secretary-General, *A Regional-Global Security Partnership: Challenges and Opportunities, delivered to the Security Council and the General Assembly*, ¶ 1, U.N. Doc. S/2006/590, A/61/204 (Jul. 28, 2006) [hereinafter Annan Report].

<sup>314</sup> *Id.* ¶ 94.

<sup>315</sup> *Id.* ¶ 96.

<sup>316</sup> *Id.* ¶ 47–49.

<sup>317</sup> The Secretary-General, *Report of the Secretary-General on the Relationship Between the United Nations and Regional Organizations, in Particular the African Union, in the Maintenance of International Peace and Security*, ¶¶ 31–34, delivered to the Security Council, U.N. Doc. S/2008/186 (Apr. 7, 2008) [hereinafter Ban Report].

<sup>318</sup> *Id.* ¶ 64.

<sup>319</sup> *Id.* ¶ 82.

<sup>320</sup> *Id.*

<sup>321</sup> Joyner, *supra* note 302, at 708.

responsibility to protect their populations.<sup>322</sup> States relinquish some measure of their sovereignty by ratifying constitutive treaties of regional organizations, particularly those with objectives to promote peace, security, and stability and provisions granting peacekeeping primacy and a right to intervene.<sup>323</sup> When these constitutive treaties contain provisions expressing an objective of the regional organization to protect the people and fundamental human rights,<sup>324</sup> it gives rise to the possibility of a responsibility upon the regional organization to proactively advance these objectives through both peaceful and, when necessary, forcible measures.<sup>325</sup> The responsibility of the regional organization, as the entity to which civilian populations may turn first if the sovereign states fail to uphold their responsibilities, may also encompass these protections owed to civilian populations. This Note thus submits that when engaging in practice pursuant to the objectives of protecting fundamental human rights, regional organizations may also benefit from, and be guided by, the normative principle of the responsibility to protect.

## CONCLUSION

Regional organizations have an increasingly prominent place in international peacekeeping, drawing from their own initiative and institutional desire on the part of the UN. The decision-making of the Security Council and the priorities of its permanent members may not be entirely adequate for the peacekeeping needs of African states and peoples. Cooperation with the UN is by no means eschewed by Africa's regional organizations and carries significant advantages. In parallel, the UN has recognized that its effectiveness can be greatly enhanced by cooperation with regional organizations. The regional organizations of Africa have reshaped the landscape of international peacekeeping, and through their instruments and practice, have substantially influenced the law on the use of force. The cultural differences between Africa and the West are more significant than we may typically appreciate, and a framework in which the African regional organizations maintain primacy over peacekeeping in their continent may be the development needed to establish a sustainable environment of stability in Africa.

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<sup>322</sup> *E.g.*, World Summit Outcome, *supra* note 297, ¶ 138; *cf.* Antônio Augusto Cançado Trindade, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUM. RTS. L. REV. 1, 5–6 (1998) (presenting this view as fundamental, prior to the inception of the R2P discourse).

<sup>323</sup> *See* Levitt AUPSC, *supra* note 29, at 123–24.

<sup>324</sup> *E.g.*, AU Constitutive Act, *supra* note 72, art. 3, para. h; ECOWAS 1993 Treaty, *supra* note 159, art. 4, para. g; ECOWAS Protocol, *supra* note 159, art. 2; SADC Amended Treaty, *supra* note 221, art. 2, para. c; SADC Protocol, *supra* note 224, art. 2, para. 2(a), 2(g).

<sup>325</sup> *Cf.* Stahn, *supra* note 299, at 120 (noting this possibility but finding a relative lack of agreement on this conclusion).