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## SCOPE OF AFRICAN UNION'S RESPONSIBILITY TO COOPERATE WITH UN REGARDING PEACE AND SECURITY

Jara Samuel Tura<sup>†</sup>

### Abstract

*The African Union (AU) cooperates with the United Nations (UN) regarding peace and security, cognizant of the power that has been entrusted to the regional organisations under the UN Charter. The AU's Constitutive Act and the Peace and Security Council Protocol enumerate the council's commitment to cooperate with the UN in maintaining peace and security on the continent in a myriad of spheres. Nonetheless, the AU's cooperation responsibilities with the UN regarding peace and security are filled with mistrust, an unclear division of labour, and overlapping mandates.*

*The unclear division of labor and overlapping of mandates hinder the AU's subsidiary role in maintaining international peace and security as well as impact the UNSC's primary role in maintaining international peace and security. Under this backdrop, it is pertinent to examine the scope of the African Union's responsibility in cooperating with the UN regarding peace and security and to delineate the spheres of cooperation in peace and security. The paper shall thus be mooted for a more formalized and nuanced collaboration between AU and UN.*

**Keywords:** African Union, cooperation, regional organizations, peace and security, United Nations.

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## I. Introduction

Regional organisations, as a grouping of states with different backgrounds, represent a significant and pillar body of institutionalism in international law.<sup>1</sup> Regional organisations continued to develop at the beginning of the 20<sup>th</sup> century as a new, dynamic institution for a myriad of purposes, including economic and military alliances.<sup>2</sup> Indeed, the post-World War-II period was a time that discussed and emphasised the role of regional organizations in the maintenance of international peace and security, which was meant to be guaranteed by the collective sanction system of the UN Charter.<sup>3</sup>

Regional organizations are not only playing an active role in redrawing the international peace and security, they have also emerged as viable tools for dealing with security challenges across the various regions of the globe.<sup>4</sup>

The UN Charter has set forth the duties of the regional organizations in the maintenance of international peace and security under Chapter VIII.<sup>5</sup> It also proclaimed and accepted the importance of regional organizations in the pacific settlement of local disputes, due to their proximity to the conflict.<sup>6</sup> *Inter alia*, the AU is an anchor regional actor in cooperating with the UN regarding peace and security.

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<sup>1</sup> Ján Klučka, Ludmila Elbert and Ján Klučka, Regionalism and Its Contribution to General International Law 25 (1<sup>st</sup> ed., Pavol Jozef Šafárik University in Košice 2015).

<sup>2</sup> Id.

<sup>3</sup> Id. at 27.

<sup>4</sup> Alyson JK Bailes and Andrew Cottey, Regional Security Cooperation in the Early 21st Century, 198–203(SIPRI Yearbook: Armaments, Disarmament and International Security 2005)

<sup>5</sup> UN Charter, art. 52-54.

<sup>6</sup> UN Charter, art.52(2).

The African Union and the United Nations have had a connection since 1965, particularly in the area of peace and security.<sup>7</sup> The first cooperation agreement was signed between the two organs in 1965 and later updated in 1990.<sup>8</sup> The agreement reiterated the complementary role assigned to the regional organization under the UN Charter in the maintenance of regional peace and security under Chapter VIII.

The relationship between the AU and the UN regarding peace and security is regulated and has a legal basis primarily in the UN charter.<sup>9</sup> The AU constitutive act and the AUPSC protocols are the guiding frameworks that determine the responsibility of the AU to cooperate with the UN regarding peace and security.

The AU chairperson has also proposed a strategic partnership between the AU and the UN in 2012 in areas of peace and security.<sup>10</sup> The partnership outlines that a strong Africa is not for its member states only; rather, it assists international peace and security.<sup>11</sup> Nonetheless, the relationship between the UN and AU is more strained regarding the right to interventions outlined under the constitutive act and the protocol.

The AU has the authority to intervene in severe circumstances of core international crimes in member states, such as genocide, crimes against humanity, and war crimes, with the agreement of the head of

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<sup>7</sup> PD Williams and A Boutellis, Partnership Peacekeeping: Challenges and Opportunities in the United Nations-African Union Relationship, 113 African Affairs 254, 257(2014).

<sup>8</sup> UNSC/Resolution 1197 (1998) ¶ 3.

<sup>9</sup> UN Charter, art. 52.

<sup>10</sup> Nebiyou Dagne Tessema, The United Nations Security Mechanism and Africa: Challenges and the Way Forward (2014) 148 (PhD Thesis, Golden Gate University School of Law, San Francisco at 148)

<sup>11</sup> Charles Rizki Majinge, Future of Peacekeeping in Africa and the Normative Role of the African Union, 2 GOETTINGEN J. INT'L L. 463, 463 (2010).



state or Assembly.<sup>12</sup> The inclusion of the authority to intervene in AU legal frameworks has resulted in overlapping mandates with the UN Security Council's (UNSC) unique capacity to employ force.

To this end, AU-UN cooperation in peace and security demands a more formalized collaboration that is built upon comparative advantages and shared understandings of specific crises and clarifies respective duties in conflict management and settlement. As a result, the core objective of the paper is to better comprehend and unpack the scope of the AU's responsibility in cooperating with the UN in terms of peace and security.

The paper proceeds as follows: Section one discusses the legal foundation of the AU's responsibility to cooperate with the UN regarding peace and security. Section two outlines the role of the African Union in the pacific settlement of local disputes. Section three discusses the role of regional organizations in enforcement action. Section 4 analyses the scope of the AU's responsibility to cooperate with the UN regarding peace and security. Section 5 outlines the modalities of cooperation between the UN and the AU regarding peace and security. Section 6 concludes the findings.

## **II. The Legal Foundation of the AU's Responsibility to Cooperate with the UN**

The UN Charter has entrusted regional organizations with the responsibility of maintaining international peace and security, achieving pacific settlement of local disputes (52-54), and ensuring economic cooperation through five regional economic communities.<sup>13</sup> The recognition is part of the UN member states' concessions to a regionalism approach at the San Francisco conference.

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<sup>12</sup> AU Constitutive Act, art. 4(h).

<sup>13</sup> Klučka, *supra* n.2 at 27.

Chapters VIII and VI of the Charter serve as a cornerstone and legal basis in connecting the UN and regional organizations in the maintenance of international peace and security. Regional organizations could use the power granted to them in the charter to settle local conflicts. The charter authorized them to settle local dispute peacefully and to take enforcement action under the supervision of the UN Security Council.<sup>14</sup>

The two UN Secretary Generals have redefined the strategic alliance between the AU and the UN.<sup>15</sup> The Secretary General's proposals emphasize the importance of regional organizations in sustaining international peace and security. Both examined how to build a complementary framework between the UN and regional organizations in order to ensure world peace and security.<sup>16</sup>

Over the last decades, the AU and the UN have recognized the importance of cooperation in maintaining international peace and security. The Ten-year Framework for Capacity Building Programme of the AU is one aspect of cooperation stemming from the acknowledgment of regional organizations' role in maintaining international peace and security.<sup>17</sup>

The AU is working with the UN to maintain local disputes in a peaceful manner. In recognition of this and as part of cooperation, the AU developed a robust and comprehensive legislative framework. The Peace and Security Council Protocol (PSC) recognizes the primary role of the Security Council in maintaining international peace and security.

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<sup>14</sup> UN Charter art.52-53.

<sup>15</sup> Tessema, Supra, n. 9 at 144

<sup>16</sup> Id.

<sup>17</sup> Towards Greater Strategic and Political Coherence, AUPSC Report, ¶4 (2012).

The objective of the PSC is to maintain peace, stability, and security.<sup>18</sup> Furthermore, the council has developed a subordinate organ with the task of enhancing peace and security through the instrumentalities outlined in the protocol.<sup>19</sup>

### **III. Responsibilities of Regional Organization in Pacific Settlement of Local Dispute**

The UN Charter's Chapters VI and VIII provide the legal framework that connects regional organizations with the UN in the pursuit of world peace and security. Particularly, Chapter VI of the charter is devoted to the pacific settlement of disputes. Despite the fact that the charter does not define the term "*pacific settlement of local dispute*" it does list out the methods. However, as can be deduced from the lists in art.33 of the charter, the pacific resolution procedures under the UN charter that are provided implicitly to regional bodies are illustrative.<sup>20</sup>

Eide defined the concept of pacific settlement of dispute as follows: "on-mandatory recommendations to the parties involved in a dispute or a situation, aiming at assisting them in finding a peaceful solution of their conflict. Such recommendations may most properly be conceived as an advice, and may concern the procedures which the organization finds suitable to recommend".<sup>21</sup>

Therefore, the pacific settlement of a dispute is a non-binding recommendation in which the parties are not accountable for violations other than moral responsibility. Furthermore, it is feasible to argue that the steps adopted under the pacific settlement are

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<sup>18</sup> AUPSC, art. 3.

<sup>19</sup> AUPSC, art.8(5).

<sup>20</sup> A. Eide, Peacekeeping and Enforcement by Regional Organizations: its Place in the United Nations System 3 Journal of Peace Research 125,125 (1966).

<sup>21</sup> Id.

compatible with the charter's assertion of art. 2(4). As stated in Chapter VI of the charter, the notion of pacific settlement of disputes with what it inculcates is as follows:

- (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, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
- (2) The Security Council shall, when it deems necessary, call upon the parties to settle the dispute by such means.<sup>22</sup>

The provision articulates that any dispute that endangers the tranquility of international peace and security should first exhaustively pass through the scrutiny of regional organizations at first glance.

The methods bestowed for the regional organizations under the provision are illustrative, and this can be inferred from the phrase outlined at the end of the provision, that is “other peaceful means of their own choice”. According to Bruno Simma, other peaceful means are those methods by which parties to a conflict may devise strategies for resolving disputes by combining the procedures listed under art. 33 and modifying them in a way that appears appropriate to their grievances.<sup>23</sup>

The power of regional organizations to settle local disputes that may endanger international peace and security may still be taken away by the UNSC by calling on the parties.<sup>24</sup> In addition, the power to determine whether or not the continuance of a dispute endangers the

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<sup>22</sup> UN Charter art.33.

<sup>23</sup> Bruno Simma et. el., The Charter of the United Nations: A Commentary, 1418 (3<sup>rd</sup> ed. 2012).

<sup>24</sup> UN Charter, art.33(2).

maintenance of peace and security still resides under the ambit of UNSC power.<sup>25</sup>

Simma argued that the chapter VIII of the UN charter specifies and acknowledges efforts undertaken by the regional arrangements would enjoy certain priority in pacific settlement of dispute.<sup>26</sup> Such balance is vividly outlined in the manila declaration, where, members of regional arrangement should need to make every effort in settling their respective dispute through the disposal of regional arrangements before referring to the UNSC.<sup>27</sup>

Chapter VIII of the charter, in addition to Chapter VI, which explains the function of regional organizations in the pacific settlement of conflicts, also discusses regional organizations' role in the pacific settlement of local disputes.<sup>28</sup> For the first time in the charter, the article expresses the existence of regional organizations and acknowledges their importance in maintaining international peace and security. It further emphasized that regional organizations' efforts to maintain international peace and security must be consistent with the UN's objectives and principles.<sup>29</sup>

Furthermore, every member of the UN that is within the regional organization or other arrangements can first seek the help of the regional organization in the first instance before resorting to the UNSC.<sup>30</sup> Such a procedural right only applies to states that are part of the regional arrangements, and the parties to the conflict must ensure that they have used the regional processes successfully. In

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<sup>25</sup> UN Charter, art.34.

<sup>26</sup> Simma, *Supra*, n.52.

<sup>27</sup> *Id.* at 1418-1419.

<sup>28</sup> UN Charter, art. 52.

<sup>29</sup> *Id.*

<sup>30</sup> UN Charter art. 33(1).

addition, members of the UN can also take their cases to the UNSC and the (United Nations General Assembly) UNGA.<sup>31</sup>

#### **IV. Responsibility of Regional Organizations in Enforcement Action**

The roles of regional organizations are not limited to the peaceful settlement of local disputes. Rather, it extends right up to taking enforcement actions in their member states when there is a threat to the peace or a breach of the peace under the scrutiny of the UNSC.<sup>32</sup> The term "enforcement action" was included in Chapter VIII of the charter without being defined. During the San Francisco conference, states agreed that enforcement action refers to the UNSC's actions conducted in accordance with articles 41 and 42.<sup>33</sup> Article 41 of the charter includes the following measures taken by the UNSC: Such as disrupting economic links as well as rail, sea, air, postal, telegraphic, radio, and other modes of communication, as well as severing diplomatic contacts.<sup>34</sup> Along the same lines, the enforcement action also included measures mentioned under Art. 42 of the charter. Actions taken under such provisions usually involve actions by the armed forces. Such as action by air, sea, or land to maintain or restore international peace and security. Demonstrations, blockades, and other operations by air, sea, or land troops of UN members are examples of such action.<sup>35</sup>

Generally, the notion of enforcement action under Chapter eight has included only military measures, and the practice of the UNSC also

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<sup>31</sup> Id. art.35(1).

<sup>32</sup> UN Charter art.53(1).

<sup>33</sup> LM Goodrich, E Hambro and AP Simons, Charter of the United Nations. Commentary and Documents 365 (3<sup>rd</sup> ed. CUP, New York 1969).

<sup>34</sup> UN Charter art.41.

<sup>35</sup> UN Charter art. 42.

entails the use of force mentioned under chapter seven of the charter, which includes the use of force to maintain.<sup>36</sup>

Having seen the definition of the enforcement action under the UN Charter, let's now deal on the subsequent provisions of Chapter VIII. Article 53 of the charter reads as follows: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council".<sup>37</sup>

The provision reaffirmed the UN Security Council's ultimate role in taking and authorizing enforcement action, and while regional organizations initiate enforcement action on their own, they should get approval from the UNSC. Alternatively, such delegated enforcement action cannot be revoked without the express approval of the UN Security Council.

Thomas Kwasi Teiku and Tanzel F. Hakok in their paper on Hybrid Paternalism, considered the relationship between UN and regional mechanism in Chapter VIII of the Charter as sub-constructing or delegation based on bureaucracy.<sup>38</sup> In this system the regional organizations are obliged to undertake groundworks monitored and guided by the UNSC.<sup>39</sup>

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<sup>36</sup> Shashi Tharoor, The Changing Face of Peace-Keeping and Peace-Enforcement 19 Fordham Intl. Law J. 408, 409-510 (1995)

<sup>37</sup> UN Charter, art.53.

<sup>38</sup> Teiku and Hakok, A Curious Case of Hybrid Paternalism: Conceptualizing the Relationship Between the UN and AU on Peace and Security 4 African Conflict and Peacebuilding Review 4,132 (2014).

<sup>39</sup> Id.

The duties of regional organizations do not end here; rather, they extend up to their duty to inform the UNSC of their activities regarding peace and security.<sup>40</sup> Eefje de Volder notes that the privileged rights of regional organizations stipulated under Chapter VIII of the Charter, to settle disputes in their respective regional jurisdictions in a peaceful manner, are not free of obligations on the part of regional organizations.<sup>41</sup> That is, the regional organizations are obliged to report their activities in accordance with Article 54 of the UN Charter.<sup>42</sup>

The supplement to "an agenda for peace," released in 1995, outlined the methods of cooperation between the UN and regional organizations.<sup>43</sup> Among the mechanisms of cooperation mentioned in the report, consultation was pivotal.<sup>44</sup> The rationale for the consultation was to exchange views and information on the conflict in which both are involved. Categorically, the consultation was conducted in formal and informal ways. The former includes periodic reports, and the latter includes consultative meetings with the heads of regional organizations and arrangements.<sup>45</sup>

The substantive content of the duty to reporting includes the duty to provide security situations of the affected region, operational updates, and what the council needs to think about when making future decisions on operations.<sup>46</sup> It has been common to send formal documents containing the decisions of political bodies to the UN Secretary General, and this might allow all UN members, including

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<sup>40</sup> UN Charter, art. 54.

<sup>41</sup> Eide, *supra* n. 13.

<sup>42</sup> *Id.*

<sup>43</sup> UNRO Cooperation between the UN and Regional Organizations 7 (22 April 2022) <<https://www.securitycouncilreport.org>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Mauricio Artiñano, Peace Operations Partnerships: The UN Security Council and (Sub-)Regional Organizations, 1 Centre for International Peace 1, 4 (2012).



members of the Security Council, to keep track of the state of peacekeeping operations and the region's security situation.<sup>47</sup>

## **V. Assessment of the Scope of the AU's Responsibility to Cooperate with the UN Regarding Peace and Security**

### **A. AU's Constitutive Act**

The African Union was founded as a regional organization under international treaty law, with a key premise spelled out in the Constitutive Act. Some of the fundamentals are: sovereign equality, respect for borders existing on achievement of independence (the principle of *uti possidetis*), peace resolution of conflicts erupted in the member state, prohibition of the use of force or threat to use of force, non-interference in the internal affairs of member states, rejection and condemnation of unconstitutional change of government the right of the union to intervene when grave circumstances, namely: war crime, genocide, and crimes against humanity, and intervention by invitation to restore peace and security.<sup>48</sup>

Chapter eight of the UN Charter provided the legal foundation for collaboration between the UN and regional organizations. The AU's (Constitutive Act) CA has not specified the means of cooperation between the AU and the UN in terms of peace and security, notwithstanding the legal basis of cooperation under the charter.

Furthermore, the AU's founding act is silent on the method by which the AU and the UN collaborate. However, the constitutive act stated in the aims section that “the union shall be to encourage international cooperation, taking due account of the Charter of the United Nations

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<sup>47</sup> Id.

<sup>48</sup> AU Constitutive Act, art.3.

and the Universal Declaration of Human Rights".<sup>49</sup> The article in question describes what the African Union (AU) should do in its ties with international organizations other than the United Nations. In such behavior, the AU must first evaluate the UN's and the (United Nations Declaration of Human Rights) UDHR's rules, standards, and principles. As a result, this clause has nothing to do with cooperation with the United Nations.

### **B. Compatibility of the Right to Intervention Under the AU Constitutive Act with the UN Charter.**

The transformation of the nature of the conflict from inter-state to intra-state and the increasing human rights violations have eroded the cardinal and classical principles of state sovereignty. State sovereignty is a long-lived international law principle that stems from the Westphalia treaty in the 17<sup>th</sup> century. State sovereignty is the legal protection accorded to nation states from external intrusion into domestic affairs, regardless of their misconduct, no matter how heinous it is towards their people.<sup>50</sup>

As per the charter," All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".<sup>51</sup> Furthermore, art. 2(4) of the charter articulates the strong adherence of the UN to the principle of state sovereignty and recognizes the prohibition of the threat or use of force as one of the cornerstones of international law principles. Further, it is now universally recognised as a principle of customary international law, having been enshrined

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<sup>49</sup> AU Constitutive Act, art.3(e)

<sup>50</sup> Jeremy Sarkin, The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect, 53 African Law J.1, 4 (2009).

<sup>51</sup> UN Charter, art.2(4).

in Art. 2 (4) of the UN Charter and referred to in numerous other accords.<sup>52</sup>

Many agree that state sovereignty belongs to the specific category of international *jus cogens*, which expresses the prohibition's fundamental relevance as well as its widespread support by the world community.<sup>53</sup> By extension, it depicts the norms that ought to prevail between member states. It is true that almost all except the Genocide Convention, including the UN Charter, prohibit intervention in the affairs of member states.<sup>54</sup> Contrary to the principles of the UN Charter, the AU has incorporated a right to intervene in a member state in grave circumstances, namely, genocide, crimes against humanity, and war crimes.

Consequently, the next portion of this section examines one of the AU CA's most contentious provisions, "the right to intervention," in terms of its consistency with the UN Charter's values. The Constitutive Act's right to interfere is chosen because it is one of the bridges that allow the AU to act in member states in the name of regional peace, security, and stability. Furthermore, it is an unprecedented authority in the history of global and regional collaboration. Furthermore, the AU's right to intervene would diminish the UNSC's key responsibility for maintaining international peace and security. This argument's legitimacy will also be discussed.

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<sup>52</sup> Simma, *supra* n. 16 at 497.

<sup>53</sup> *Id.* at 481.

<sup>54</sup> Girmachew Alemu Aneme, The Institutionalization of Cosmopolitan Justice: The Case of the African Union's Right of Intervention 22\_MINN. J. INT'L L. HUMPHREY SUPP 5,7 (2013)

### **C. A Brief Comparison and Evaluation of the AU Constitutive Act and the UN Charter on the Right to Intervention**

The power to intervene under the Constitutive Act is one of the most recent norms. The Constitutive Act stipulated the substantive content of the right to intervention as follows: “AU shall function according to the principle of; the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive Act”.<sup>55</sup>

The amendment to the Constitutive Act which was adopted in 2003 has included additional factors to intervene in member states that is, ‘a serious threat to legitimate order to restore peace and stability to the member states of the union upon the recommendation of the peace and security council.’<sup>56</sup>

The article expresses the African Union's ability to act in a member state in the event of core international crimes erupting on the continent, as well as involvement by invitation. It also includes the AU's coercive measures to prevent the occurrence of these key crimes: genocide, war crimes, and crimes against humanity. Even though the AU has the authority to take forcible measures, the CA does not define what constitutes forcible measures.<sup>57</sup>

The AU's assembly, composed of heads of state and all governments of member states, decides on the manner of intervention on the recommendation of the council.<sup>58</sup> The decision needs to include the following elements. First, the assembly should make sure of the availability of the grounds of intervention stipulated under art.4(j),

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<sup>55</sup> AUPSC Protocol, art.4(j).

<sup>56</sup> AUPSC Protocol, art.4(j)

<sup>57</sup> Aneme, *Supra*, n.39 At 10-11.

<sup>58</sup> AUPSC, art.7(1)(e).

such as genocide, crimes against humanity, and war crimes.<sup>59</sup> Second, the assembly should demonstrate how the involved states failed to manage the grounds for intervention.<sup>60</sup> Third, consider establishing a framework that incorporates either military or non-military applicability in the effort to avoid intervention grounds.<sup>61</sup>

Yusuf argued that, in the report of the international commission for Intervention and State Sovereignty (ICISS), intervention in the affairs of nation state may take three forms.<sup>62</sup> Such as, political, economic, international humanitarian prosecution, and military intervention<sup>63</sup> the cumulative reading of the Constitutive Act and the Peace and Security Protocol suggests only military intervention is included at least in the case concerning art.4(h).<sup>64</sup> Nevertheless, it is possible to discern that both military and non-military actions are part of the operation on a case-by-case basis.

Art. 24 of the UN Charter gives the UNSC primary responsibility for ensuring international peace and security. Furthermore, it reserved the use of force for individual and collective self-defense under article 51, and for the security council under Chapter VII. Indeed, only the United Nations Security Council has the authority to initiate enforcement measures.<sup>65</sup> As a corollary to listing out the duties of the UNSC, the Charter has mentioned the mandate of regional organizations and other arrangements in pacific settlement of disputes. Even though without stipulating who are regional organizations and arrangements. Kioko notes that the AU and the

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<sup>59</sup> Aneme, *supra*, n. 39 at 18.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> A YUSUF Abdulqawi, *The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action* 9, (African Yearbook of International Law/Annuaire Africain de Droitinternational 2004)

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 10.

<sup>65</sup> UN Charter, art.53..

Economic Community of West African (ECOWAS) are classified as regional and sub-regional, respectively.<sup>66</sup>

Except in instances of art. 51 and 42 of the charter, the UN Charter clearly prohibits any member state from intervening. The UNSC's enforcement action is a component of the power granted to it under Chapter VII through the use of art. 24. Furthermore, enforcement activities are operations that take place in the arena of preventing and controlling conflicts, and they help to attain the great goal of sustaining international peace and security. The principles and characteristics of enforcement action must, however, be described briefly and unequivocally for greater clarity and understanding of the relations between the UNSC and the AU.

As a result, it is prudent to look into UN Charter enforcement action as well as AU CA intervention. where is the AU's right to intervention under the UN charter?

The UN Charter has not defined what constitutes enforcement action stipulated under art.52 of the charter. Though, during the debate of San Francisco conference enforcement action was intended to mean all measures taken by the security council under the realm of art. 41 and 42 of the Charter.<sup>67</sup> Thus, enforcement actions of UNSC include both non-military measures and military measures. However, practically UNSC opted for a restricted interpretation of the enforcement action.<sup>68</sup> Thus, the enforcement actions of art. 52 only applies to military measures. This position has become the rule to the regional organization subsequently.<sup>69</sup>

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<sup>66</sup> Ben Kioko, The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention 85 IRRC 807, 820 (2003).

<sup>67</sup> Gabriel Amvane, Intervention Pursuant to Article 4(h) of the Constitutive Act of the African Union without United Nations Security Council Authorization, 15 African Human Rights Law Journal 282,287 (2015).

<sup>68</sup> Id.

<sup>69</sup> Id.

The council's precedents show that it has not criticized the ECOWAS' participation in Liberia in 1990 and Sierra Leone in 1998; instead, the council has applauded the ECOWAS' involvement.<sup>70</sup> Both intrusions were undertaken without requesting the approval of the UNSC, which is a mandatory requirement when regional organizations about to engage in enforcement actions.<sup>71</sup> In both circumstances, the measures taken by the ECOWAS were non-military measures. Economic and military interventions are outrightly prohibited by art.2(4) of the Charter and by the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.<sup>72</sup> The silence of the UNSC on the actions of ECOWAS depicts military measures as the only part of the enforcement actions.

Ben Kioko defends the UN Security Council's actions in response to the ECOWAS intervention in the two member states.<sup>73</sup> According to him, the UNSC remained silent for two reasons: the ECOWAS involvement was for a popular cause, and the UNSC could not intervene at the moment.<sup>74</sup> Moreover, the AU opts to inculcate the right to intervention in its' Constitutive Act (CA) so as not to supersede and erode the primary role of the UNSC in maintaining international peace and security. Rather, it stemmed from the frustration emanating from waiting for the international community's response to the protracted civil war conflicts that erupted on the African continent. Along the same line, the AUCA has also not defined what constitutes intervention.

Aneme employed three basic parameters to ascertain the enforcement action under the Charter and the right to intervention

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<sup>70</sup> Sarkin, *supra*, n. 35 at 7

<sup>71</sup> *Id.*

<sup>72</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 122 (1977).

<sup>73</sup> Sarkin, *supra*, n. 35 at 7

<sup>74</sup> *Id.*

under the Constitutive Act.<sup>75</sup> Aneme argued that the enforcement action by the UNSC is engaged with the aim of averting threats to peace, breaches of peace, and acts of aggression. Whereas the AU intervenes in a member state with the intention of changing the behaviors of state and non-state actors engaged in the commission of grave human rights violations, namely genocide, crimes against humanity, and war crimes.<sup>76</sup>

In addition, the consent of the state concerned is mandatory in the case of intervention under the AU CA. Because at the time the member state ratifies the Constitutive Act of the AU, they also forfeited their sovereignty when the crimes mentioned under art.4(j) erupted. However, the UNSC takes enforcement action by disregarding the consent of the state concerned when there are breaches to the peace, threats to the peace and acts of aggression.<sup>77</sup>

Leaving aside Aneme's argument for the time being, the requirement of a host state agreement is put to the test by two criteria. First, from the United Nations' founding treaty, and then from UN practice. The member nations have already given their consent when they ratified the charter. They already know that if there is a threat to peace or a breach of peace on their soil, the UNSC will interfere without their consent. Furthermore, through the instrumentality of the UN, the UN has been actively participating in AU missions or when there is no approval from the host state. The AU mission in Burundi was the best instance of this argument.

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<sup>75</sup> Girmachew Alemu, (2008) as cited in (Sabelo Gumedeze, *The Peace and Security Council of the African Union Its Relationship with the United Nations, the African Union* (2011) (PhD Thesis, Abo Akademi at 117-118).

<sup>76</sup> Sabelo Gumedeze, *The Peace and Security Council of the African Union Its Relationship with the United Nations, the African Union* (2011) (PhD Thesis, Abo Akademi At 119).

<sup>77</sup> Id.



In terms of the requirement of consent to intervene under the Constitutive Act, the AU intervenes without first obtaining the consent of a host country. Consent is essential only when intervening to restore peace and security, or when intervening by invitation. Similarly, the writers of the Constitutive Act did not intend to ask for the host states' consent. In all instances, the consent of the host states is not essential.<sup>78</sup>

Thus, AU can take measures without consent like that of the UNSC. Because it is naive to suppose that the leaders of the African Union's member states acquiesce to the AU's intervention. In all cases, the parameters of permission in the UN charter and the constitutive act are the same.

From the arguments of Aneme, it seems plausible to discern that the enforcement action under the UN is different from the right to intervention under the AU CA due to the separate objectives mentioned under both instruments. One can recall that the UNSC's function is to avert threats to peace and acts of aggression, along with grave circumstances, namely genocide, war crimes, and crimes against humanity in the case of the AU.

According to Steiner, the UNSC has defined human rights breaches as a threat to international peace and security, and this obligation stems from the inherent duty to protect international peace and security.<sup>79</sup> Supporting Steiner's argument, Nico Schrijver reiterated that the ingredients of a threat to the peace have expanded from the traditional definition that required war between independent nation states.<sup>80</sup>

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<sup>78</sup> Arvid Ekengard, The African Union Mission in Sudan (AMIS), 2559FOI-R----SE 4, 10 (2008).

<sup>79</sup> Gumedze, supra, n.62. at 113.

<sup>80</sup> Nico J Schrijver, The Future of the Charter of the United Nations, 10 Max Planck UNYB 10,10 (2006).

The dynamic development of human rights concepts after WW-II contributed much to widening the ingredients of threats to peace and breaches of peace. Nico also argued that threats to the peace and breaches of peace may emanate from the neglect of states in situation deemed intolerable, namely, colonial domination, apartheid, and foreign occupation.<sup>81</sup> Furthermore, the United Nations High Commissioner for Refugees (UNHRC) mandate to determine the constituents of threat to peace and breaches to peace has led to the conclusion that the ingredients of a threat to peace and a breach to the peace are similar to crimes against human rights and that human rights violations, as well as terrorism and the proliferation of mass weapons, are ingredients of threat to peace.<sup>82</sup>

Moreover, the definition of threat to peace is elastic and covers a wide range of meanings.<sup>83</sup> The inclusion of human rights violations under the ingredients of threat to peace or the breach of it has become usual and is practised in the day-to-day activities of the UN Security Council. Moreover, the UN considers crimes against humanity, genocide, and massive violations of human rights within the borders of nation-states as concerns threatening international peace and security among nations.<sup>84</sup>

The (International Criminal Court) ICC Statute's legal definition of crimes against humanity is inextricably linked to the concept of significant human rights breaches.<sup>85</sup> Crimes against humanity overlap with some violations of fundamental human rights (such as

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<sup>81</sup> Id at 17.

<sup>82</sup> Id.

<sup>83</sup> Renice Akello Midar, *The Role of United Nations Security Council and Regional Arrangements in the Maintenance of International Peace and Security: The Case of the Organization of African Unity (Oau)/African Union*, (2016) (Master's Thesis, Nairobi University At 35).

<sup>84</sup> Yusuf, supra, n. 43 at 11.

<sup>85</sup> Id.

torture, rape, or enslavement), which thereby become criminalized under a global treaty," i.e., the ICC Statute.<sup>86</sup> All of these components of the main crimes constitute crimes against humanity.<sup>87</sup> The Bill of Rights and the Geneva Convention both provide protection for these values. Furthermore, any severe conditions under Art. 4 of the Constitutive Acts can be argued to be egregious violations of human rights, threats to the peace, and breaches of the peace.

Serious breaches of the so called-inviolable human rights are included in the criminalization of serious human rights crimes. One of the most fundamental characteristics of this collection of human rights is that they are unaffected by derogations.<sup>88</sup> As a result, fundamental human rights values such as the right to be free from torture or other cruel, inhumane, or degrading treatment, the right not to be deprived of life in an extrajudicial or arbitrary manner, the right not to be subject to slavery or serfdom, and a set of fundamental fair trial guarantees can all be found in this category of hard-core human rights.<sup>89</sup>

In general, based on UNSC precedence on enforcement action after the Cold War, the right to intervene under the AU CA is a subset of the grounds for UNSC enforcement action, and thus is consistent with the UN charter assertion. The right to intervene under the AU CA does not, in fact, violate the UN charter's domestic jurisdictional clause. It is also a cornerstone of cosmopolitan justice.

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<sup>86</sup> Juan Pablo Pérez-León Acevedo, The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses, 1 *Anuario Mexicano de Derecho Internacional* 1,152 (2017).

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Id.

In addition to that, besides the compatibility of the right to intervention under the AU CA with the UN Charter, the enforcement action according to the AU language of the 'right to intervention' needs to follow certain rules of intervention stipulated under the ICISS document. Such as right authority, just cause, right intention, last resort, reasonable prospect, and proportional means. Furthermore, the right to intervention under the AU still functions under the scrutiny of the UN Charter. This has been expressed in the PSC Protocol that acknowledges Chapter VII of the Charter. Therefore, any action taken as per the AU action is under strong scrutiny by the UN.

Having seen the compatibility of AU intervention in light of the UN Charter domestic jurisdictional clause and enforcement actions, the next part of the section analyses the notion of prior authorization. In statutory terms, Art. 53 of the Charter obligate regional organizations to request prior approval while they are engaged in enforcement actions. Furthermore, there would not be any intervention under the realm of the AU without prior authorization by the UNSC. However, the CA of the AU did not stipulate any terms regarding authorization in the constitutive act despite the fact that the UN has mandated regional organizations to do so. The ensuing sections explore the framers of the AUCA's rationale in this regard. Is prior UNSC approval required for the AU to intervene in accordance with the formal and substantive requirements of AU CA Art. 4(h)?

#### **D. Necessary and Prior Authorization**

In the UN Charter framework, regional organizations serve as both a complement and a subordinate to the UN in maintaining international peace and security. Their complementary roles come into play when it comes to resolving conflicts in their respective scopes of jurisdiction through the use of pacific settlement of local disputes. The United Nations General Assembly emphasized the

complementary and subordinate roles of regional organizations in ensuring international peace and security.<sup>90</sup> The AU as a regional organization have also acknowledged the primary roles of the UNSC in maintaining international peace and security.

When regional organizations seek to take enforcement steps in a member state, they must get prior authorization from the UNSC. The Charter states the position of the UNSC regarding enforcement actions of the regional organization as follows: "...but no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...".<sup>91</sup> Any enforcement actions conducted by regional organizations must first be approved by the UNSC, according to the rule. The AU CA act's right to intervention component, however, does not explain the legitimacy of prior authorization and stays silent, in breach of the Charter's limits.

According to Simma, the interpretation of the art.53(1) implicitly carries room for *ex post facto* authorization<sup>92</sup>. The conclusion derives from the wording of art. 54 of the Charter. The Charter obliges regional organizations to keep informed of their activities undertaken or contemplation to the Security Council.<sup>93</sup> The term "undertaken" in the article has considered *ex post facto* authorization of regional organizations.<sup>94</sup> The question, therefore becomes, why did the framers of the AU charter remain silent on this issue? What were the framers of the AU Constitutive Act's intentions when it came to authorization? Or would there be preemptive action, as the

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<sup>90</sup> G.A.Res.49/57, Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security, ¶ 3 (1995).

<sup>91</sup> UN Charter art.53(1).

<sup>92</sup> A YUSUF, *supra*, n. 43 at 12

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

US has done in the past when its interest in intervening fails to be met by UNSC resolutions?

The failure of the ineffectual OAU in avoiding and controlling grave human rights violations in Uganda, Central African Republic, and most notably the genocide in Rwanda, according to Murithi, was the underlying cause for instilling the right to intervention within the CA.<sup>95</sup> Furthermore, the OAU's mechanism for conflict prevention and management had ceased to intervene in domestic matters on the premise of the host state's consent to intervene, as well as the host states' answer suggesting that they are resolving the matter on their own.

All of these barriers, however, amount to millions of civilian deaths and evictions. This horrible act was committed while the UNSC was in operation, without using any of the mechanisms outlined under Chapter VII of the UN Charter. Supporting argument was forwarded by Levitt. He argued as follows:

The decision not to include such language in the protocol, according to senior AU official, was a conscious decision by AU leaders due to the debacles in Somalia and Rwanda so the assembly decided not to bind themselves to rules and systems that have failed Africa, or the policy prescriptions of certain powers.<sup>96</sup>

In light of the foregoing arguments, it is feasible to say that the UNSC's reckless response to African conflicts exemplifies the reasons why the AU chooses to include the right to intervene in CA. In the paper presenting the shared African position in the proposed UN reform, the Ezulwini consensus, the AU has declared its view on the procedural requirement of obtaining approval. As per the document, regional organizations operating within the scope of UN

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<sup>95</sup> Kioko, *supra*, n 50 at 812.

<sup>96</sup> Jeremy I Levitt, *The Peace and Security Council of the African Union: The Known Unknowns*, 13 *Transnat'l L. & Contemp. Probs* 3, 17 (2003).

Charter Chapter VIII must seek UNSC permission prior to enforcing peace. However, under urgent circumstances or *ex post facto*, it would be reasonable to request clearance after the fact.<sup>97</sup>

Furthermore, the UNSC's previous experiences showed that authorization was granted after the event. For instance, NATO's action in Yugoslavia during the Kosovo crisis in 1999, ECOWAS' intervention in Sierra Leone and Liberia, and economic sanctions imposed on Burundi by eastern African states were all done without prior UNSC approval, and the request was made in the middle of the fight, and at the end.<sup>98</sup> As a result of the UNSC's reaction to both organizations' actions, previous approval has become conditional and determined on a case-by-case basis. According to Kioko, the UNSC has begun to deviate from its rigorous adherence authorization, owing to regional organizations' acts arising from a popular will and the UNSC's failure to exercise its inherent power.<sup>99</sup>

The other formidable concern regarding authorization is when UNSC members fail to express their approval when it is requested. Intervention by the AU would be legal in such a situation. Since the lives of civilians should not be at the expense of the UNSC's silence or displaced as a result of the UNSC members' inaction, The AU must take steps to safeguard continental peace and security without seeking UNCS approval. For this purpose, the AU member states have demonstrated their willingness to disregard a fundamental premise of international law in order to prevent civilian killings and mass displacement.

Aneme argued on the issue of authorization from the touchstone of treaty-based intervention. According to him, the AU's right to intervene is treaty based or is a result of the assent of 53 member

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<sup>97</sup> Kioko, *supra*, n. 50 at 820.

<sup>98</sup> *Id.* at 822.

<sup>99</sup> *Id.*

states.<sup>100</sup> As a result, when member states ratified the CA, they were inadvertently agreeing to the AU intervening in cases of egregious human rights violations or for the reasons specified in article 4. (h). As a result, the AU does not need UNSC authorization for its intervention.<sup>101</sup>

In a similar vein, article 103 of the UN Charter declares that in the case of a conflict, member states' commitments under the UN Charter take precedence over their duties under other international accords. Regardless, AU member states' obligations under the AU CA do not conflict with their obligations under the UN Charter for two very obvious reasons. First, the AU CA is an international treaty document that comes into effect as a result of the member states' express consent via ratification and incorporation into their national laws. Second, the UN Charter is silent on the issue of regional organization measures used to save civilian lives in a severe human rights violation. In other words, the Charter is silent in the event of a disagreement between customary international law and the charter's requirements. Despite what some may claim, the charter includes all customary laws. Taking this into account, the right to intervention under the AU CA is an exception to the charter's art.103.<sup>102</sup>

In general, even if the CA does not specifically mention this, it is necessary to deduce that the AU is not need to obtain UNSC authorization for its action in a member state for two main reasons. First, the AU's stance is a result of the precedent the UNSC set with regard to the conflicts that took place in Africa. Second, the AU CA is a global agreement with an intervention right. Therefore, the right to intervene is also governed by treaties. The AU must decide whether to implement resolutions or change the underlying legislative framework in order to resolve these issues in order to strengthen coordination and collaboration between the UN and the

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<sup>100</sup> Aneme, *supra*, n. 39 at 13.

<sup>101</sup> *Id.*

<sup>102</sup> Levitt, *supra*, n. 78 at 22.



AU. Similarly, the UNSC should explicitly state its position on regional organization authorization in enforcement actions. Furthermore, the UNSC's silence does not always imply approval. Because authorization may not always come from the council, which is rife with power politics.

## **VI. Modalities of Cooperation Between the AU and the UN Regarding Peace and Security.**

### **A. Joint Consultation Mechanism**

The United Nations and the African Union have a legal relationship that stems from Chapter 8 of the UN Charter, which inculcates the fields of collaboration. The AU has undertaken a thorough reform, pledging to continue this relationship in the areas of conflict prevention, peacekeeping, and peacebuilding. Furthermore, in order to maximise the benefits of cooperation, the two organs must consult on their respective mandates in order to improve coordination, flexibility, and mutual understanding, to avoid misunderstandings, and to lay out the next course of action.

The PSC may consult with parties involved and interested in the current conflict situation in both formal and informal consultation. Parties could include nation states, civil society organizations, international organizations, and regional arrangements aimed at ensuring the continent's peace and security.<sup>103</sup>

Since the maiden meeting of the PSC and the UNSC in 2007, the practical joint consultation mechanism has been part of the UN-AU cooperation for.<sup>104</sup> Since 2007, the UNSC and the PSC have had five consultation meetings in Addis Ababa and New York on how to

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<sup>103</sup> AUPSC, art.8(11).

<sup>104</sup> AU peace and security council, Report of the Chairperson of the Commission on the Partnership between the African Union and the United Nation on Peace and Security: Towards Greater Strategic and Political Coherence. ¶ 42 (2012).

establish good relationships between the two organizations in the field of peace and security.<sup>105</sup> They reaffirmed the importance of building strategic relationships, particularly subregional arrangements in the continent, at the maiden meeting of the UNSC and PSC in 2007.<sup>106</sup>

In a 2010 consultation, both the PSC and the UNSC discussed ways to strengthen their cooperation and considered undertaking collaborative field missions on a case-by-case basis and as needed in peacekeeping missions, with the goal of assessing the performance and weaknesses of the peacekeeping mission.<sup>107</sup> Given the importance of consultation in strengthening the AU-UN relationship in terms of peace and security, the pledges have yet to be translated into practice, and time restrictions are also putting pressure on annual consultation commitments.<sup>108</sup>

### **B. Cooperation Between the UN Secretariat and the AU Commission**

The partnership between the two executive organs, the one led by the UN secretary general and the parallel AU commission, will serve as a model conduit to improve the two organs' interaction in all areas, including peace and security. The UN Office to the AU (UNOAU), which was established on July 1, 2010, and is headed by a Special Representative of the Secretary-General, is a welcome decision to combine the mandates of the various UN offices to the AU, namely the UN Liaison Office to the AU (UNLO-AU), the Peacekeeping Support Team, and the Planning Team for Africa Union Mission to Somalia (AMISOM), as well as the support elements of the United

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<sup>105</sup> *Id.* ¶ 44.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* ¶ 43.

<sup>108</sup> *Id.* ¶ 44.

Nations-African Union Mission in Darfur (UNAMID) Joint Coordination Mechanism.<sup>109</sup>

At their 5<sup>th</sup> annual consultative meeting, both the AU Commission and the UN Secretaries welcomed the establishment of the UNOAU considering the role it plays in creating feasibility and strengthening cooperation between the two organs in maintaining international peace and security.<sup>110</sup> Moreover, the operation of the two organs resides in the plethora of political level and capacity building.<sup>111</sup>

The AUPSC has also expressed its duty towards the UNSC regarding consultation and reporting as follows: AU Commission – UN Secretariat shall;

(a) Enhance the exchange of information and coordination on issues of common concern; encourage desk-to-desk consultation; (b) Undertake joint missions and activities on issues of common concern; (c) Periodic meetings between the relevant Departments of the AU Commission and the UN Secretariat to review status of cooperation in the area of peace and security and identify activities to be undertaken.<sup>112</sup>

In recognition of this responsibility, both the AU and the UN have participated in numerous desk-to-desk consultations. Bahir Dar (2006), New York (2009), Addis Ababa (2009), Gaborone (2010), and Nairobi (2011) are just a few of them.<sup>113</sup>

Additionally, the UN established an AU liaison office in Addis Ababa in 2008 as part of reporting to strengthen information

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<sup>109</sup> Id., ¶ 48.

<sup>110</sup> Id.

<sup>111</sup> Id., ¶ 49.

<sup>112</sup> UNSC/Presidential Statement, Relationship Between the United Nations and Regional Organizations, in particular the African Union, in the Maintenance of International Peace and Security 2, (2012).

<sup>113</sup> Towards greater strategic and political coherence, supra n.18.

exchange facilities for the AU in areas of humanitarian policy development, response coordination, and advocacy in information exchange management and resource mobilization under the auspices of offices for the coordination of humanitarian affairs.<sup>114</sup>

The ten-year Capacity Building Programme is part and parcel of the capacity building programme provided by the UN to the AU in areas of peace and security.<sup>115</sup> Desk-to-Desk meetings between the AU and the UN which brings together the desk officers of the two organizations in areas of peace and security is one realm of AU commission and the UN secretariat interaction.<sup>116</sup>

## VII. Concluding Remarks

Regional organizations are accorded the power to settle local disputes peacefully and engage in enforcement action upon the authorization of the UNSC. Chapter VI and Chapter VIII serve as bridges between the UN and regional organisations. Under this backdrop, the AU has come up with a robust and comprehensive peace and security mechanism that devotes itself to the power entrusted to it by the UN Charter and the AU's Constitutive Act. However, the relationship between the two inter-governmental organs regarding the right to intervention is filled with suspicion and overlapping mandates.

The AU Constitutive Act is silent on whether approval is necessary for intervening following the grounds of intervention stipulated under Art. 4(h) of the Constitutive Act. In addition to normative silence, the framers of the Constitutive Act intended to obviate the UNSC's primary role in maintaining international peace and security.

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<sup>114</sup> Maintenance of International Peace and Security , UNGA report on the Relationship between the United Nations and Regional Organizations, ¶9, (2008)

<sup>115</sup> Towards Greater Strategic and Political Consensus, Supra, 18, ¶ 49

<sup>116</sup> Id., ¶ 49.

The AU's right of intervention and the prohibition under Art. 2(4) of the charter did not contravene each other. The AU's right of intervention is set in motion when grave circumstances, namely, crimes of genocide, crimes against humanity, and war crimes, are present and when a request is made to restore peace and security.

The grounds for the UNSC's intervention are similar to the grounds for intervention under the Constitutive Act. Since the ingredients of threats to the peace and breaches of the peace are part and parcel of the ingredients of genocide, crimes against humanity, and war crimes, Moreover, the AU inculcates a cosmopolitan justice model in which state sovereignty might be suspended to protect humanity. In terms of the AU's scope of cooperation with the UN, the AU's action, in particular, should be justified, proportional, and based on proper authority, proper intent, last resort, and a reasonable prospect.

Through the procedures of joint consultation, the AU and UN work together to maintain international security and peace. In order to evaluate the effectiveness and weaknesses of the peacekeeping mission, the PSC and UNSC both discussed methods to improve their collaboration and proposed carrying out joint field operations on an as-needed and case-by-case basis. The partnership between the UN Secretariat and the AU Commission, which is overseen by the UN Secretary General and operates concurrently, serves as a role model for how the two organisations may work more effectively in all areas, including peace and security.

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